

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3 Before The Honorable Virginia K. DeMarchi, Magistrate Judge  
4  
5 TAYLOR, et al., )  
6 Plaintiffs, )  
7 vs. ) Case No. C 20-07956-VKD  
8 GOOGLE, LLC, )  
9 Defendant. )  
)

San Jose, California  
Tuesday, August 19, 2025

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND  
RECORDING 10:02 - 12:54 = 2 HOURS 52 MINUTES

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1 Tuesday, August 19, 2025

10:02 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Now calling Case 20-CV-07956-VKD,  
5 Taylor, et al. versus Google, LLC.

6 Counsel, if you can please state your appearance,  
7 beginning with the Plaintiff.

8 MS. GIULIANELLI: Karma Giulianelli for the  
9 Plaintiffs, from Bartlit Beck.

10 THE COURT: Good morning.

11 MS. GIULIANELLI: Good morning.

12 MR. SUMMERS: And also Glen Summers from Bartlit  
13 Beck.

14 MR. WALLENSTEIN: And Marc Wallenstein from Korein  
15 Tillery.

16 THE COURT: Okay. Good morning.

17 MR. SOMVICHIAN: Good morning, your Honor. Whitty  
18 Somvichian with Cooley for Google today.

19 THE COURT: Good morning.

20 MR. BORN: And Emily Born, also with Cooley for  
21 Google.

22 THE COURT: Okay. Good morning.

23 So, we have several matters on for hearing this  
24 morning. We have the Plaintiffs' motion for class  
25 certification, the Plaintiffs' Daubert motion regarding the

1 Defendant's damages experts, Gos (phonetic)? Am I saying  
2 that correctly?

3 MR. SOMVICHIAN: Gos.

4 THE COURT: Gos. And Jeffay (phonetic), yes?

5 MR. SOMVICHIAN: Correct.

6 THE COURT: All right. And then we also have the  
7 Defendant's Daubert motions regarding Plaintiffs' damages  
8 experts Huntner (phonetic) and Steck (phonetic), and the  
9 Defendant's Daubert motion regarding the Plaintiffs' experts  
10 on network usage, purpose of transfers, and some other  
11 things regarding Mr. Thompson, Doctor Steck, and Doctor  
12 White.

13 And then there's all the things that you all have filed  
14 recently, supplemental briefing requested, last-minute stuff  
15 last night. I'm not really going to belabor that. We can  
16 maybe talk about that at the end, but I'm not going to spend  
17 a lot of time on those additional things at the moment.

18 I understand you have some plans about how you want to  
19 argue I guess. I have some -- five decks here. I'm happy  
20 to hear from you about how you would like to proceed. Let  
21 me invite the Plaintiffs' side first to address that  
22 question.

23 MR. SUMMERS: Your Honor, Glen Summers on behalf  
24 of the Plaintiffs. I would just say that the Plaintiffs  
25 have two motions as -- as the Court has already mentioned, a

1 motion for class certification and a Daubert motion. As  
2 between the two, we would like to focus on the motion for  
3 class certification today and use our time there. Ms.  
4 Giulianelli will be handling that, but I just wanted to make  
5 that clear. That's the one we think is priority for the  
6 day.

7 THE COURT: Okay. And how did the Defendants  
8 think you should proceed?

9 MR. SOMVICHIAN: Your Honor, I agree we should  
10 focus on the class certification issues. The Daubert issues  
11 are -- are also important. We'll take our cues as to when  
12 and -- and how you want to address those, but I agree the  
13 class certification motion is probably the right place to  
14 start.

15 THE COURT: That was my sense as well, although it  
16 seemed to me like there may be some Daubert issues that --

17 MR. SOMVICHIAN: Yes.

18 THE COURT: -- overlap with some of the questions  
19 that are presented. So, before we get that -- to that  
20 issue, nobody asked for this hearing to be conducted under  
21 seal. I have not dug into your extremely large omnibus  
22 motion to seal papers.

23 Are there massive disagreements about what should and  
24 should not be sealed for purposes of the class cert briefing  
25 and the Daubert briefing?

1 MR. SOMVICHIAN: Your Honor, given who's in the  
2 courtroom, I don't think that's a live concern.

3 THE COURT: Well, this is a public hearing, and  
4 there will be a public transcript. I mean, you know the  
5 procedures for once a transcript is made.

6 If there is something that should not be said out loud,  
7 I'm going to rely on the parties to alert the Court to that  
8 issue if you need to discuss something that everybody agrees  
9 is sealed or subject to a sealing request, but, otherwise,  
10 it's a public hearing is how I plan to proceed. Okay.

11 Is that -- is that acceptable to the Plaintiffs' side?

12 MS. GIULIANELLI: That is, and I was going to say  
13 I do not intend for the class cert or the Daubert to say  
14 anything that was not -- that -- that I think is  
15 confidential and that was not already publicly available and  
16 testified to in a trial that was just in the State Court  
17 case. So, there's nothing confidential that I am aware of  
18 that I intend to say.

19 THE COURT: Right. And -- and it would be  
20 principally Google's information. So, Mr. Somvichian, I'll  
21 count on you to raise your hand and alert the Court if  
22 there's something that you think shouldn't be discussed.  
23 Okay?

24 MR. SOMVICHIAN: Yes, your Honor. And -- and with  
25 counsel's representation, I think -- I think we're on fairly

1 safe territory today.

2 THE COURT: Okay. Very good.

3 MR. SOMVICHIAN: I would ask just procedurally, it  
4 was my understanding with -- that there -- there could be a  
5 request after the public --

6 THE COURT: Yes.

7 MR. SOMVICHIAN: -- transcript is made available  
8 to -- before it is made public to request sealing in --

9 THE COURT: Yes. You --

10 MR. SOMVICHIAN: -- that context.

11 THE COURT: That is -- that is true. That is,  
12 under the rules, how we have it. However, presumptively,  
13 I'm conducting this sealing -- this hearing in public.  
14 Anybody could walk in the door while we're talking, and you  
15 would be saying things out loud in a public forum. Okay.

16 MR. SOMVICHIAN: Understood.

17 THE COURT: So, that's how we proceed.

18 All right. Let me start. The first question that I  
19 had for class certification -- now, I know you have prepared  
20 materials. I don't want to disrupt your presentation, but I  
21 did want to highlight a concern I had, which is I was  
22 surprised -- maybe I shouldn't be surprised, but given that  
23 you've already been through a trial in a parallel  
24 proceeding, there seems to be disagreement about what was  
25 allegedly converted here.

1       So, initially, it was five categories of data transfer.  
2 Then it was four categories of data transfer. So, the  
3 Plaintiffs are talking about in terms of categories of  
4 transfer. Google refers to specific data transfers that are  
5 maybe within the categories. I had a little bit of trouble  
6 even mapping what goes within a Plaintiff category, you  
7 know, what -- what goes with what. And there are -- there's  
8 a discussion about things within the larger categories that  
9 are like not actionable because they don't fit what the  
10 Plaintiffs' sort of definition is of a subject, you know,  
11 converted data.

12       So, I was hoping that as a very fundamental point, the  
13 Plaintiffs could explain to me what are the defining  
14 features of the challenged transfers. I think I have some  
15 idea, but I'd like to hear from you.

16               MS. GIULIANELLI: I can do that.

17               THE COURT: Good.

18               MS. GIULIANELLI: And, in fact, that was one of --  
19 and let me do that immediately. It was the first segment of  
20 my argument --

21               THE COURT: Okay.

22               MS. GIULIANELLI: -- after an introduction. I'd  
23 like to go back to the introduction in a minute, but in  
24 terms of the challenged transfers, your Honor -- and we have  
25 on -- we've prepared a slide deck --



1 THE COURT: Um-hmm.

2 MS. GIULIANELLI: -- that is in front of your  
3 Honor and the clerk has as well on Google. Page three just  
4 lists the categories. And let me explain the defining  
5 features of each of those categories.

6 As an initial matter, your Honor, we are no longer --  
7 and we did not in the California case -- pursuing check-in  
8 transfers. So, they're not on here. They're just a very  
9 small category of -- of transfers. And, so, we're not  
10 pursuing those. We're pursuing the ones listed on slide  
11 three.

12 THE COURT: Okay. I'm looking at slide three, and  
13 it says, How much cellular data Google converted.

14 MS. GIULIANELLI: I think that your Honor may have  
15 the Daubert deck.

16 THE COURT: Oh, wrong one. Okay. No.

17 MS. GIULIANELLI: There's a class certification  
18 deck which I can hand up.

19 THE COURT: I have two Daubert ones. Okay. I  
20 don't have the class cert one I don't think. Maybe my clerk  
21 has two class cert ones. I'll switch. There we go. Okay.  
22 That seems more reasonable.

23 Okay. So, yes, I think I'm on the page that you're  
24 referring to. Thank you.

25 MS. GIULIANELLI: And, so, the categories of

1 transfers -- and I -- and I will get into a little detail  
2 because it's complicated and it matters to your Honor's  
3 question.

4       The first category is Clearcut logs, and Clearcut is a  
5 system at Google for logging historical information about  
6 everything basically that happened on the phone. So,  
7 whenever someone does something on the phone, these logs,  
8 which are just historical information, are sent to Google on  
9 a scheduler. It's a defined schedule. And it's built into  
10 Google's android operating system called GmsCore, and none  
11 of the logs need to be sent over cellular because they just  
12 provide google with non-time-sensitive information about  
13 things that have occurred in the past.

14       And, so, the first category of transfers are Clearcut  
15 logs, and the defining characteristic of this and the reason  
16 that these are converted is they are historical information  
17 about things that happened on the phone that are unnecessary  
18 for the usage of any -- of anything that the user is doing  
19 in the moment on the phone to make any application work.  
20 They do not need to be sent over cellular. They don't need  
21 to consume user's data, and it doesn't matter what  
22 information is in the log, and this may be one of the things  
23 that is confusing the Court with respect to Clearcut because  
24 Google argues that there are all sorts of different logs.  
25 There are 1300 logs in Clearcut, and it argues that some of

1 them are for this or some of them are for battery and some  
2 of them are to record certain types of data and other types  
3 of data. What is in the logs does not matter. So, there  
4 will be no individualized issues. And that's because all of  
5 the logs are sent over cellular for historical information.  
6 They're not time sensitive, and none of them are disclosed  
7 to the user.

8 THE COURT: So, can I pause you there?

9 MS. GIULIANELLI: Yes.

10 THE COURT: So, when we -- when I last heard from  
11 you all on this case, the framing was passive data  
12 transfers. Is that the same thing as historical, doesn't  
13 require the use of cellular data, you know, sort of in the  
14 moment, can wait till there's a WiFi connection? Is that  
15 what that means?

16 MS. GIULIANELLI: It basically is. I think  
17 passive is shorthand, and the way that the experts have  
18 basically defined passive in the merits reports is that it  
19 is passive. In other words, it's not prompted by what the  
20 user is doing in the moment or what the user is doing on the  
21 phone. So, it's not like the user is using an application  
22 and immediately there needs to be a transfer sent in  
23 connection with the use of the application. So, passive is  
24 defined --

25 THE COURT: Okay.

1 MS. GIULIANELLI: -- as -- is that.

2 THE COURT: So, that's when -- so, passive and  
3 sort of historical nonsensitive -- non-time-sensitive  
4 information is kind of -- I should think of that as kind of  
5 a single sort of feature, defining feature of this category.

6 And then you said unnecessary to the operation of the  
7 phone. So, there seems to be a lot of discussion of the  
8 purpose of the transfer.

9 So, when you say "unnecessary", it sounds like it's a  
10 little bit different than saying it's just not immediately  
11 needed in the moment, and I want to understand what you mean  
12 by unnecessary because I understand Google argues that some  
13 data transfers are necessary to make sure the phone is safe,  
14 secure, operational, gets updates, et cetera, et cetera.

15 So, when you say "unnecessary", what do the Plaintiffs  
16 mean by that?

17 MS. GIULIANELLI: So, the Plaintiffs mean that it  
18 is unnecessary for Google to send this historical  
19 information over cellular in order to make -- using cellular  
20 data in order to make the transfers -- excuse me -- in order  
21 to make the phone or the application work.

22 Now, Google says that certain transfers may be  
23 Clearcut, but I think it talks -- and I'm getting to ad  
24 attestation and experiments. Google says these are  
25 necessary for, as your Honor said, experiments or updating

1 or installing. That is a dispute, and that is a dispute on  
2 the merits about what these transfers are that will be  
3 resolved on a class-wide basis. And we are going to show  
4 with common evidence that none of the transfers are about  
5 security for the user. None of them are about updating or  
6 installing software. And, so, Google's characterization of  
7 the transfers is different from what we will -- is -- is a  
8 dispute on the merits, and we will prove that with common  
9 evidence. But they are un -- all of the Clearcut, none of  
10 the transfers are necessary for security, for the operation  
11 of the phone in the moment to be sent over cellular.

12 THE COURT: Why does that matter, though? So,  
13 here -- here's where I'm getting hung up. So, if the  
14 defining -- if the -- if the critical thing is you don't  
15 need to use cellular, okay, you could say that about a lot  
16 of things. You could just wait for WiFi. As long as it's  
17 not time sensitive, just wait for WiFi, assuming that the  
18 phone -- and maybe this is a good assumption. Maybe it's  
19 not a good assumption -- always will eventually connect to  
20 WiFi.

21 So, when the observation is made that it's not only  
22 passive and -- and not time sensitive, a log can be sent  
23 whenever, but it's also unnecessary. That seems like  
24 something else. It means like there's all this debate about  
25 Google's using it for its own marketing purposes, its own

1 targeted advertising purposes, its own business development  
2 purposes, like piggy backing unfairly as opposed to doing it  
3 at a time when it wouldn't have to but, nevertheless, doing  
4 things that are important for the phone, to make sure that  
5 it's secure and gets updated and all of those things, but  
6 you don't have to do it via cellular. And I'm just -- I'm  
7 trying to understand if there are two arguments or  
8 everything is just under the umbrella of you don't need to  
9 do it with cellular, therefore, it's a converted data byte.

10 MS. GIULIANELLI: I think it's a great question,  
11 and it goes to the issue of consent and whether the users  
12 had all material information and the language in Google's  
13 disclosures.

14 So, first of all, the fact that none of it has to be  
15 sent over cellular is enough, and we will show that nothing  
16 in Google's disclosures say that it needs to be sent over  
17 cell -- the information will be sent over cellular, and  
18 that's enough. However, there if more, and this is where  
19 the unnecessary or the purpose or whether or not it's about  
20 security comes in. And the reason for that dispute, if you  
21 will, is that Google has certain disclosures in its terms  
22 and conditions and its privacy policy that use the word  
23 "security", use the word "update". Now, even those do not  
24 say that things will be sent using cellular. So, the fact  
25 that it's not cellular is enough, to be clear --

1 THE COURT: If I'm going to ask you --

2 MS. GIULIANELLI: -- but --

3 THE COURT: -- about Plaintiffs' theory of the  
4 case --

5 MS. GIULIANELLI: Yes.

6 THE COURT: -- you would say, We don't think  
7 there's consent for anything. But if we got into the weeds  
8 on that and we lost on that issue and there was some consent  
9 based on a disclosure for some -- some subset of data sent  
10 over the cellular network, we would say, Okay. Fine, but  
11 then there's the rest of it that was sent over the cellular  
12 network for which there was no consent, because it doesn't  
13 fall into the security of the et cetera bucket.

14 Is that fair?

15 MS. GIULIANELLI: That's -- that's very close,  
16 yes. So, whatever google says is going to transfer in the  
17 disclosures, it cannot exceed the scope of the consent. So,  
18 I think your Honor is -- is asking about the scope of the  
19 consent.

20 So, if Google were to show -- which we dispute, and we  
21 will show it using class-wide evidence, that some portion of  
22 the transfer or one of the purposes is about security, we  
23 will show that -- and we dispute that, by the way, with  
24 classified evidence, but we will show that Google's  
25 transfers go way beyond security, that they are unnecessary,

1 that they serve Google's own business purposes, its  
2 advertising, and that they are unnecessarily using cellular  
3 data for non-time-sensitive transfers.

4 And, so, in that situation, your Honor, we would show  
5 that Google has exceeded the scope of any consent, and that  
6 is not allowed. So, the reason that we are talking about  
7 the purpose, whether or not it's security or whether or not  
8 it's updating, it goes -- it's both, that every disclosure  
9 needs to have all material fact. The disclosures, as the  
10 cases say, the, you know, Calhoon (phonetic) case, the  
11 Frasco, they have to -- actually, both implied and express  
12 consent, and also implied explicitly notify the users of the  
13 conduct. That's the standard.

14 And when Google does not notify the users about the  
15 purpose -- now, Google says in disclosures that it will make  
16 transfers not over cellular but for security purposes.  
17 That's why this is an issue. Google is trying to shoehorn  
18 these transfers into the language of its disclosures to  
19 argue express consent.

20 THE COURT: I'd rather not get into the consent  
21 issue.

22 MS. GIULIANELLI: Okay. Yes.

23 THE COURT: Because now what I'm trying to  
24 understand is --

25 MS. GIULIANELLI: But that's the reason.



1 THE COURT: -- what -- it is, but I thank -- I  
2 thank you for that explanation, but I am just trying to  
3 figure out what the Plaintiffs' theory of the case -- and I  
4 think some of this may matter a lot when we get into  
5 quantification because then I can see how slicing and dicing  
6 what was the purpose for the transfer might matter in terms  
7 of how you count. I don't know. But -- but I'd rather just  
8 understand at the -- the front end what the it is.

9 MS. GIULIANELLI: Yes.

10 THE COURT: What was the subject of the alleged  
11 conversion. Okay. So, Clearcut logs.

12 MS. GIULIANELLI: Yes.

13 THE COURT: I think I've got that.

14 MS. GIULIANELLI: So, for Clearcut logs, they are  
15 the subject of the conversion is all historical logs sent  
16 over the Clearcut system, which are -- do not need to be  
17 sent over cellular, not time sensitive, sent on a scheduler.  
18 And they are not for the security of the phone or what the  
19 user is doing in the moment.

20 And, now, the next one is experiments. Experiments is  
21 a category of transfers where Google conducts secret testing  
22 of software changes that Google makes on phones. It runs  
23 tens of thousands of experiments on phones every day. So,  
24 these experiments, the category of experiments -- and I  
25 don't think that there's a dispute about how the categories

1 are transferred because Google tags them internally as  
2 Clearcut tags. So, it knows everything that's Clearcut, and  
3 we can get into this with damages.

4 Experiments are tagged by Google in its data under what  
5 it calls PH transfers, and these are signals that turn on or  
6 off software if the phone has already downloaded and -- and  
7 installed using cellular data. And, so, basically, it's a  
8 way for Google to experiment with like settings on the  
9 phone. If it moves something around on the interface or if  
10 it has -- you know, if -- it experiments with all sorts of  
11 different things.

12 Now, Google argues that experiments serve multiple  
13 functions and that there are multiple types of experiments.  
14 That's true, but it's irrelevant because, regardless of the  
15 function, Plaintiffs will show with class-wide evidence that  
16 they are still experiments, and they're not disclosed.

17 THE COURT: So, would you say that anything that  
18 has this PH tag in your experiments bucket is in the  
19 category of what we're talking about, alleged converged data  
20 bates, and we're not going to look under the hood about what  
21 the experiment is or is not for?

22 MS. GIULIANELLI: Correct. For purposes of  
23 showing conversion, we do not need to show what the  
24 experiment is not for. Now, it's -- it is -- the -- the  
25 fact that Google -- how Google is experimenting on users is

1 relevant. There are many different kinds of experiments.  
2 There's AB testing. There's experiments about software  
3 that's not yet released. All of this stuff fall under the  
4 kinds of things that Google experiments on, and that's  
5 relevant for the jury to know how it impacts advertising,  
6 but it does not define whether or not it's conversion.

7 THE COURT: We'll get to whether it's relevant for  
8 the jury to know in a moment, but -- but in terms of the  
9 Plaintiffs' theory of the case, it's anything that has a  
10 Clearcut tag, anything that has a PG tag -- is it PH?

11 MS. GIULIANELLI: Correct.

12 THE COURT: Okay. Anything that has a PH tag,  
13 that's the entire category?

14 MS. GIULIANELLI: Correct.

15 THE COURT: Okay. And then we move on to ad  
16 attestation, and that's where it seemed to me that Google  
17 was arguing there are sort of subcategories that were  
18 meaningful for the analysis, and I'd like to hear -- I'm not  
19 entirely sure I understand the Plaintiffs' view of that.

20 MS. GIULIANELLI: Yes. So -- so, we disagreed,  
21 but there are different categories of ad attestation  
22 transfers, but they are all -- the defining characteristic  
23 of the entire set -- and I can speak to the categories -- is  
24 that they are triggered -- it's a complex set of transfers  
25 that are triggered basically by when an ad is called for.

1 So, every time a user clicks on an ad, it secretly triggers  
2 a cascade of transfers that are all under the bucket of ad  
3 attestation, without notifying the user, and they support  
4 Google's advertising business because what these particular  
5 transfers are -- and, again, they are delineated by tags  
6 that we counted, specific tags, and these specific tags are  
7 associated with basically verifying to Google so that it  
8 could tell the advertiser that there's a real person  
9 clicking on the ads.

10 So, basically, these are happening so that Google can  
11 charge more money for each click. And, again, they're not  
12 for the user's security. So --

13 THE COURT: So, wait a minute. I mean, I -- I'm  
14 really kind of resisting having to get into the notion of  
15 the sort of morality or not of what's going on, whether it's  
16 -- I mean, lots of things our devices do, thank God, are  
17 secret from the user because I wouldn't want to know every  
18 time my computer is doing a particular operation. So, I'm  
19 not sure what -- when you're highlighting for me this  
20 happens in secret and that happens in secret, I mean, for  
21 obvious reasons, the way that the -- the device and the  
22 applications are supported by advertising. I think we all  
23 know this now. So, the fact that there is advertising on  
24 the phone doesn't seem to me to be a critical feature of the  
25 Plaintiffs' case. So, I'm really just trying to tease out

1 what is the critical feature. Is it that the ad attestation  
2 operation that you're describing is something that is  
3 necessary to have happened between Google and its ad  
4 customer and the phone user could care, or could not care,  
5 could only care in the indirect sense that if it -- there  
6 weren't advertising on the platform, it would have to pay  
7 more for services. I mean, I'm not really sure what to make  
8 of these observations here from, you know, the point of view  
9 of what is the theory of conversion in this category.

10 MS. GIULIANELLI: So, the theory of conversion --  
11 and it's not a morality thing. It really goes to consent  
12 because the theory of conversion here is that there are  
13 transfers that are triggered by Google's advertising  
14 business that are specifically connected with Google  
15 attesting that it's a real user that's using user cellular  
16 data, and that is not disclosed, and that is the real issue.

17 What is disclosed in various disclosures, Google talks  
18 about user security or transfers that may happen for user  
19 security. By the way, it still never says cellular. So,  
20 that's not enough of a disclosure. But with respect to the  
21 ad attestation transfers, the critical feature is that these  
22 are transfers that, using Google's -- excuse me -- using  
23 Plaintiffs' cellular data, that support Google's advertising  
24 business because they attest to the advertiser that it's a  
25 real human, and the reason it's conversion is because it is

1 using -- it's not about morality, and users know that Google  
2 is an advertising platform, certainly. But what users do  
3 not know and what Google never discloses is that every time  
4 an ad is clicked, their cellular data will be used in order  
5 for Google to prove through this series of transfers to the  
6 advertiser that it's a human clicking it, and that's what's  
7 not disclosed, and that's why it's conversion.

8 THE COURT: So -- okay. That's -- this is a  
9 useful juncture maybe for me to ask this other question  
10 which has been puzzling me, which is that there's -- there  
11 seem to be some categories of data transfer that I  
12 understand Google to say people know this is happening  
13 because this is the way phones work. Okay.

14 Is this kind of thing the kind of thing that people  
15 would assume is happening because this is the way phones --  
16 android phones work, meaning, yes, Google will let an  
17 advertiser know that you're a human and not a bot. That's  
18 the way advertising works. It's an advertising platform.  
19 Whether someone literally knows or doesn't know, I mean,  
20 this is the way these things work. How is -- how is this  
21 sort of the kind of thing that would be something -- and I'm  
22 not even sure this is the right framing, but this is  
23 something that a -- you know, a -- a class member would be  
24 like, That's my data. You should not be using it for that  
25 purpose.

1       You know, it's like the -- I'm -- I'm trying to figure  
2 out like where do the Plaintiffs draw this line, and it may  
3 not be anything like the sort of sentiment I just expressed.  
4 It may be just completely -- I'm hoping it's completely  
5 objective. That's why I was asking what are the defining  
6 features, but -- and I'm hoping it doesn't depend on consent  
7 either, although some of these things may. But does this  
8 question make any sense to you?

9           MS. GIULIANELLI: It -- it does make sense, and I  
10 think that -- that your Honor is asking basically -- is  
11 basically trying to figure out Google's argument and then  
12 Plaintiffs' response. And with respect to the issue of,  
13 Wait a minute. Don't people know that this is the way  
14 things work, that depends on Google's characterization of  
15 what these transfers are because Google says these transfers  
16 are for security or they're to update phones. Of course,  
17 people know that there are security features on the phone  
18 for the user or it's to update software.

19       But Plaintiffs are going to show with common class-wide  
20 evidence that these transfers with expert technical  
21 testimony are not about how Google characterizes them. So,  
22 a lot of this issue of, Wait a minute. This is just how  
23 phones work. Users know this, that depends on Google's  
24 characterization of what these transfers are, not what  
25 Plaintiffs will show these transfers are with common class-

1 wide evidence.

2 Now, with respect to the issue -- your Honor used the  
3 example of like advertising -- advertising. Wait a minute.  
4 Don't people just know that there's -- you know, that Google  
5 will verify? There is no objective evidence that an  
6 objective reasonable user, which is the standard for implied  
7 consent and express consent under the Calhoon Ninth Circuit  
8 and also the Frasco v. Flo and Meta Pixel, the standard, as  
9 your Honor said, is not up to -- is not subjective. It's  
10 the objective reasonable person, and there is not any  
11 evidence that the reasonable person would understand because  
12 it's not in Google's disclosures, and there's no other  
13 evidence. There's no survey evidence or anything that --  
14 that these transfers -- that Google's going to be using  
15 user's cellular data charged against a user's plan in order  
16 to verify to advertisers that it's a real human. That's  
17 what people don't know, and that's what the common average  
18 reasonable user does not -- does not know.

19 THE COURT: And is this ad attestation bucket  
20 limited to Google using the data transfer to -- to verify  
21 that the user is a human and not a bot? That's what -- from  
22 Plaintiffs' perspective, that's what that bucket is about?

23 MS. GIULIANELLI: Yes. From Plaintiffs'  
24 perspective, that bucket is all about transfers that are  
25 being made by Google to show that there -- that there's a



1 real human.

2 So, for instance --

3 THE COURT: And is there a tag in the data that  
4 you can rely on to objectively distinguish those from other  
5 things?

6 MS. GIULIANELLI: Exactly. I was just going to  
7 say that. For instance, there are very -- and -- and we can  
8 get to this when we count damages. Google actually tags  
9 these transfers by category, and with respect to ad  
10 attestation, there's like four different subcategories here.  
11 There's GAS, which is about -- you know, it's a Google Ad  
12 Services system. And then there's DroidGuard. These are  
13 very specific tags that Google itself tags them to say all  
14 of the transfers under DroidGuard are under this tag. We  
15 rely on those tags, and we don't need to and we do not say  
16 only some sort of DroidGuard is this and some sort of  
17 DroidGuard is some other purpose because everything under  
18 the DroidGuard tag, which is the largest category under ad  
19 attestation, is for the purpose of showing to an advertiser,  
20 using the user cellular data charged against their plan,  
21 which is the key, that it's a real person.

22 Now, Google says, Well, DroidGuard does other things.  
23 It provides safety. It provides, you know, stuff for  
24 banking, and -- and it does other things too.

25 Now, DroidGuard supports a separate tag called

1 SafetyNet. We do not count those categories in our damages.  
2 SafetyNet is a separate tag, and it is not included. So,  
3 the DroidGuard transfers, when DroidGuard makes a transfer,  
4 it is under the DroidGuard tag, and it is for ad  
5 attestation. DroidGuard supports other things like, you  
6 know, maybe some banking applications or third parties that  
7 want to verify something. That does not prompt a challenged  
8 transfer.

9 THE COURT: Okay.

10 MS. GIULIANELLI: So, we do not need to get into  
11 that. We do not count those.

12 THE COURT: Okay. All right. So, that's the ad  
13 attestation category. What about the fourth category that  
14 you have?

15 MS. GIULIANELLI: The fourth category is actually  
16 a very small amount of damages, and we're seeking to have  
17 all these categories certified, and the fourth category is  
18 location uploads.

19 Now, these are uploads that happen when the user is  
20 moving like 200 meters and they are uploads of where routers  
21 are and where like cellular towers are. And, so, Google  
22 uses these uploads to build its internal map, and it  
23 refreshes the internal map like every seven days, sometimes  
24 more. But these uploads are not to tell the user where the  
25 user is. It is not Google Maps. It is not for the user to

1 find themselves in the moment when the user's looking for  
2 directions. That's not what these are. They're uploads  
3 basically of like right now I don't know if there's some  
4 router in here and I had an android, it would be -- and then  
5 I moved, it would be pinging Google and saying, Oh, there's  
6 a router in the courtroom so that Google knows where routers  
7 are.

8 THE COURT: So, when you say internal maps, it's  
9 -- because there was some part of the -- the papers that  
10 suggested it was -- and maybe this was the checking category  
11 that's no longer here --

12 MS. GIULIANELLI: Yeah.

13 THE COURT: -- that Google's building profiles of  
14 users, et cetera, et cetera. Okay. That's not what you're  
15 talking about here. It's not an internal map of where the  
16 humans who have androids are going at any given time. It's  
17 for Google to understand what infrastructure surrounds users  
18 who have the android phones?

19 MS. GIULIANELLI: Correct. It's for Google  
20 basically to -- to build its mapping application. So, it  
21 wants to know where all the routers and WiFi towers are, and  
22 that happens even when the phone is idle. So, if it's on  
23 your night stand or if it's in your purse and you're  
24 walking, it will be constantly pinging Google when you move  
25 like 200 meters to show it where things are. And the

1 defining characteristic of this is that they are uploads and  
2 they go to a very specific table. It's like a tag again.  
3 So, we know we can count these uploads because they are  
4 measured in a table, and -- and it's unnecessary to use  
5 users' cellular data. Again, they're not time sensitive.  
6 Google doesn't need thousands of uploads of where the router  
7 is in this courtroom from people even when they're not using  
8 the phone and it's idle to build its internal map. It's  
9 historical information.

10 THE COURT: Okay. So --

11 MS. GIULIANELLI: And -- and basically this  
12 happens when all apps are turned off. The user's doing  
13 nothing. It's just they just happen, these uploads.

14 THE COURT: Okay. So, again, at risk of derailing  
15 your whole presentation by asking my favorite --

16 MS. GIULIANELLI: These are important.

17 THE COURT: You've referred repeatedly to  
18 Plaintiffs will show this by common evidence. And, of  
19 course, I've read Google's opposition papers, which say  
20 different devices, different plans, you know, different  
21 things happen at different times, and then I see the  
22 representation that based on this sample of 9,000 users,  
23 there are these various percentages of 96 percent of these  
24 users had this category of data transfer, 99 percent, all  
25 but one has this category.

1       So, I am trying to sort out how the parties can have  
2 such vast disagreement on those issues, and I'm wondering  
3 does the dispute about the commonality of the evidence and  
4 the -- the extent to which everyone in this sample set or  
5 almost everyone in the sample set experienced a particular  
6 category of transfer. Does that require me to investigate  
7 the Daubert issues that are raised about, for example, Mr.  
8 Thompson's work? So --

9               MS. GIULIANELLI: I can --

10              THE COURT: Yeah.

11              MS. GIULIANELLI: I can answer that. No, I don't  
12 think that this goes to the Daubert issues that are raised.  
13 I think that the dispute comes from Google's  
14 characterization of these transfers. We -- as -- as I just  
15 explained, these transfers all have certain defining  
16 characteristics. Like Clearcut logs are historical logging.  
17 Experiments are PH flags.

18       Google says, Wait. There are 1300 Clearcut logs, and  
19 every one has a different information in it. I think part  
20 of the dispute comes from that. We say that the information  
21 in the logs doesn't matter because they're all converted.  
22 None of the evidence is -- none of what is in the logs is  
23 necessary to show that they're all converted, that they all  
24 use cellular data that's unconsented to, undisclosed and --  
25 and the improper taking of Plaintiffs' information.

1           So, I think part of the issue comes with Google's  
2 characterization of what these transfers are versus the fact  
3 that these are categories with common characteristics and  
4 we're going to show that all of the categories, for  
5 instance, all PH flags are undisclosed experiments.

6           THE COURT: So, that may be, but I understand  
7 Google to say those transfers don't happen on all devices  
8 and for all users within the class, that there is not class-  
9 wide evidence of that happening, and to put a fine point on  
10 it, I understand Plaintiffs' thesis to be that these  
11 transfers are mandatory and automatic, at least to some  
12 extent. So, maybe you can as a user limit the amount of  
13 data transferred by turning off your usage and diagnostics  
14 setting, for example, but you won't eliminate it. So that  
15 if you are a user who has a phone and you -- it's within the  
16 class definition for the relevant period of time, the  
17 transfers in these categories are mandatory and automatic  
18 except for these few outliers, and I don't know if there's  
19 an explanation for that but that you're not getting to your  
20 class-wide proof evidence by means of some improper, you  
21 know, gap filling in the data or -- you know, according to  
22 Google's description -- or assumptions that aren't  
23 warranted.

24           That's what I'm trying to understand. So, on the  
25 capable of class-wide proof, what can you tell me about that

1 concern?

2 MS. GIULIANELLI: I think that that's exactly  
3 right. These transfers are all mandatory. They are all  
4 triggered by GmsCore. It is the same for every class member  
5 across the class period. For example, Clearcut, it happens  
6 on every phone. It happens according to a scheduler. It  
7 does not vary from class member to class member.  
8 Experiments as well.

9 In fact, I think that table, I think it's Exhibits 1 or  
10 2, shows that only out of the random sample I think of  
11 10,000 users, only -- and I don't know why -- one class  
12 member does not -- one -- one did not experience these  
13 transfers. So, this is -- this is class-wide evidence.  
14 These transfers happen to almost every single person in the  
15 class because they are built into GmsCore, and that's the  
16 way the software operates, and that's what our technical  
17 experts will explain at trial.

18 THE COURT: But didn't the data sample of 9,000  
19 users include only people who has usage and diagnostics  
20 turned on?

21 MS. GIULIANELLI: That's a -- that's a dispute  
22 that we have on the merits. That's what Google says. We  
23 disagree. Our technical expert -- and this was the subject  
24 of cross examination at the last trial. And, in fact, the  
25 jury I think disagreed because they sided with us and they

1 gave damages based on the -- the counting of all the -- all  
2 the network transfers.

3 Google says that it only includes people who have usage  
4 and diagnostics turned on. We have evidence and our expert  
5 says, Oh, no, no. This particular log is called the  
6 Westworld log. It's one of the Clearcut logs, and it's what  
7 measures the data usage. This log sends regardless of  
8 whether or not users have usage and diagnostics on or off.  
9 That's a dispute. Google's experts disagree, and we will  
10 show with class-wide evidence that that's just not correct.  
11 That is a dispute between the experts for the merits. So,  
12 our experts disagree on that.

13 THE COURT: So, when we get to -- let's assume  
14 that you have a class and what you're trying to figure out  
15 is within the class, for a given class member, how much of  
16 this -- of their data was used in the way that is alleged to  
17 be conversion. So, there may be some people who rarely use  
18 their phones and have only a tiny tiny amount of data usage  
19 at all, including data usage that was converted by Google  
20 and others maybe used their phone to a large extent, and  
21 perhaps -- perhaps that correlates with a greater usage of  
22 the kind that the Plaintiffs are complaining about.

23 So, will there be data for which to, you know, allocate  
24 to individual class members their -- you know, whatever it  
25 is, the -- their damages based on their alleged converted



1 data? Does that data exist in the world?

2 MS. GIULIANELLI: It should -- this is a very  
3 specific question, and I'll give you a very specific answer,  
4 and then I'll explain how we measure it, but, yes, it should  
5 exist. Google maintains that data unless Google has  
6 destroyed it. But Google maintains data by android ID, by  
7 user, of every single user's transfers. And our expert, Mr.  
8 Thompson, has opined that -- and this is actually the other  
9 deck that your Honor has, and this is -- or, actually, no.  
10 This is slide 17 of this deck that -- there is a way to  
11 calculate on an individual-by-individual basis using the  
12 same -- same exact methodology how much data each individual  
13 phone used, and Google has that data. It's used running it  
14 through the exact same program that he ran the sample of  
15 10,000 through, the exact same program. It's basically a  
16 computer program, and it adds up. For 10,000 samples, we  
17 have 15 billion pages. It's a lot, but it's a couple  
18 hundred thousand dollars, we verified, to store the data for  
19 all the individuals. So, Google should have that.

20 Now, so, we have that methodology, and we can do that.  
21 Now, what we did for purposes of calculating class-wide  
22 damages was take a random sample. So, it should be  
23 representative.

24 THE COURT: Of the -- of the 10,000?

25 MS. GIULIANELLI: Of the 10,000.

1 THE COURT: Okay.

2 MS. GIULIANELLI: A random sample that Google  
3 pulled across the class. It's a massive sample, and it's  
4 representative, of course, because it's random and it's a  
5 big sample, of all the users and the -- and their data  
6 usage.

7 And, so, what we did -- and this is part of the damages  
8 methodology -- we counted the average bytes that was -- that  
9 were basically consumed, converted in each of these  
10 categories, which are by tags. You can tell what they are  
11 by tag. We counted those of the 10,000 random sample. And  
12 -- and the use of averages is -- is permitted in calculating  
13 damages in class actions, and we've cited cases in our  
14 brief, but --

15 THE COURT: But wait a minute. I mean maybe I  
16 misunderstood this about your papers. I thought that the  
17 showing was that you would calculate the amount of data that  
18 was converted, data -- bytes of cellular data that were  
19 converted that was used -- that has these defining features,  
20 these four categories, that was used by Google without  
21 permission, and then there would be an amount, which is the  
22 price, the value -- like a value of a given byte, and then  
23 you would do a multiplication, and it would -- yes, you  
24 could get a number across the entire class and maybe an  
25 average would be a way to -- to approximate that, but that

1 what you'd actually be doing in terms of class members  
2 awards would be based on the specific -- the specifics for  
3 each class member.

4 Is that not how -- I mean, we're talking about more  
5 than 100 million people. So, I'm -- I'm not -- in terms of  
6 the damage methodology for the class, I'm just not sure I  
7 understood your last remark.

8 MS. GIULIANELLI: Yeah. We don't -- we submit  
9 that we don't need to do that last step. We don't need to,  
10 but if we absolutely had to, we could. So, your Honor is  
11 right about the way damages on a class-wide basis are  
12 calculated. We have the sample of 10,000 users. We  
13 calculate the average data usage based on the representative  
14 random sample, and then we multiply it by -- and I'll get --  
15 I can get into this too -- the -- the fair market value of a  
16 byte. And that's how we come up with class-wide damages.  
17 And the use of representative samples and average inputs is  
18 permitted. And, so, that is the way we come up with  
19 damages.

20 Now, if the issue is the allocation basically of  
21 damages between class members at the plan of allocation  
22 basically at the -- at that stage, first of all, that  
23 actually is not an issue that really -- I think it was in  
24 the Brown v. Google case actually where the Brown v. Google  
25 court said that if the argument is about apportioning

1 aggregate damages --

2 THE COURT: Afterwards.

3 MS. GIULIANELLI: Afterwards?

4 THE COURT: Um-hmm.

5 MS. GIULIANELLI: -- that's -- that's not an issue  
6 and in Brown v. Google, the Court rejected that because they  
7 said that's not an issue for Google to argue. But we could  
8 do that.

9 THE COURT: Okay.

10 MS. GIULIANELLI: And we could do that based on  
11 the data that Google has if we needed to because Google does  
12 maintain records of --

13 THE COURT: Yeah. Okay.

14 MS. GIULIANELLI: -- what these people used.

15 THE COURT: I mean, it puts a lot of --

16 MS. GIULIANELLI: But we could just do it on a pro  
17 rata basis too.

18 THE COURT: Okay. I mean, the reason I'm asking  
19 about this is it puts a lot of pressure on the nature of the  
20 sample that was used and then the randomization within that  
21 sample, because if it was -- I thought it was 9,000. If  
22 it's 10,000, whatever it is, it's less than one percent of  
23 the class. And if it's less than one percent that has  
24 features that are not shared by the whole class, whether by  
25 time or settings turned off or on, then it seems to me

1 potentially problematic to then extrapolate in the way that  
2 you're describing, if it is not truly representative. So, I  
3 was trying to understand that. But I had -- I had put that  
4 to the side in my brain because I thought that so long as  
5 the fair market value has a basis for being calculated --  
6 and we will get to that -- then it is whatever the data  
7 usage is for a given user times that. That's the total, and  
8 that's also the allocation. And, so, if that's possible to  
9 do or impossible to do, I thought maybe I should know about  
10 that.

11 MS. GIULIANELLI: It is possible to do, but I  
12 think I'd like to say something about the sample --

13 THE COURT: Sure.

14 MS. GIULIANELLI: -- because even if it -- it's a  
15 huge sample. So, 10,000 users, even if it's one percent,  
16 is, our statistician says, very very -- it's a large large  
17 sample.

18 THE COURT: And who's your statistician that  
19 you're referring to?

20 MS. GIULIANELLI: Jeff Steck is the statistician.

21 THE COURT: Is the statistician. Okay.

22 MS. GIULIANELLI: And, in fact, it -- 10,000 users  
23 is a massive sample, and I think cases have recognized that.  
24 And, so, as long as it's random and representative -- and it  
25 is, and we have no reason to believe -- Google pulled it,

1 and Google told us it was pulling a random sample. So, we  
2 do think that based on that sample, it's very scientifically  
3 reasonable, valid, and --

4 THE COURT: Okay.

5 MS. GIULIANELLI: -- defensible to extrapolate to  
6 the class.

7 THE COURT: Okay. Most of my questions are about  
8 the damages model --

9 MS. GIULIANELLI: Okay.

10 THE COURT: -- after we get past this. But if  
11 there's something you want to tell me more about liability,  
12 but I have questions about how liability connects to the  
13 damages theory or the -- just the theory of harm in the  
14 case, and I don't want to prematurely jump to that if  
15 there's something more you'd like to share with me.

16 MS. GIULIANELLI: I would like to share whatever  
17 your Honor has questions about is my -- is my first instinct  
18 here.

19 THE COURT: Okay.

20 MS. GIULIANELLI: But we -- for -- for the class  
21 certification -- and I'm not sure if the damages model  
22 questions relate to that, and I think I'll be arguing some,  
23 and -- and Mr. Summers will be arguing some. But I think  
24 for the clear point, the clear issue -- and if your Honor --  
25 I should just say, you're the Judge. So, you should

1 interrupt me and tell me to move on if I don't need to, but  
2 for class certification, I think the key point is that  
3 everything is going to be shown with common evidence, and  
4 that includes all of the elements of conversion. It  
5 includes consent and implied consent. Class -- conversion  
6 cases are routinely certified for class treatment. We cite  
7 them, McClure, Wycart (phonetic), in our brief, and those  
8 are cases where consent was disputed, and cases involving  
9 issues of consent, including implied consent, are also  
10 routinely certified in nonconversion cases as well, the  
11 Frasco v. Flo Health case in the Northern District of  
12 California. And, of course, the reason -- and I think your  
13 Honor touched on this -- is because implied and express  
14 consent are both judged by the objective reasonable person  
15 standard. And, so, Judge Donato said you apply that  
16 standard, and that is what you look at in -- in arguing  
17 looking at issues of consent on a class-wide basis.

18 And, so, you know, Google's arguments that there are  
19 different versions of software, different settings and  
20 different cellular data plans fail, of course. The  
21 transfers all come from GmsCore. They all have certain  
22 defining objective characterizations, and none of the  
23 settings disclose the transfers or how they happen over  
24 cellular, how often they happen or what they are.  
25 Therefore, they don't give all the material facts to any

1 person, not an average user, not an MIT engineer. And, so,  
2 that's going to be shown with class-wide evidence here.  
3 And, so, that's the -- the key part.

4 Now, I think I've just talked at somewhat length about  
5 the -- the transfers. And if your Honor would like, I can  
6 talk a little bit, and the reason that I'm happy to talk  
7 about it or not if it's not -- if your Honor doesn't have  
8 questions -- about consent, because google makes a big deal  
9 of consent in its papers.

10 THE COURT: I'll just tell you I don't think that  
11 -- well, I will hear from Google on this point. But it does  
12 seem to me that the -- if the question of consent depends on  
13 particular materials being shown to people or not, the  
14 problem would be if I were to find as a matter of law maybe  
15 on summary judgment some day that a particular disclosure  
16 was consent. Otherwise, it does seem to me that the  
17 argument that -- that the parties are having is -- is class  
18 wide in the sense of, you know, if a user saw X, does that  
19 constitute consent. And you're arguing that none of the  
20 documents constitute consent. Therefore, it's -- it can be,  
21 you know, treated on a class-wide basis.

22 So, you know, if I credit this argument, that the only  
23 basis for -- for consent are these sort of non-user-specific  
24 communications, they're posted on the website. They're part  
25 of the privacy -- whatever they are. They're documents that



1 users could have seen, class members could have seen,  
2 whether they saw them, understood them or not, and you're  
3 arguing that none of them constitute consent, then -- then  
4 your framing is on a class-wide basis.

5 It could be that when we get to the summary judgment  
6 stage, if I find otherwise, the could be decertification of  
7 the class is how I was thinking about it. Does that make  
8 sense?

9 MS. GIULIANELLI: I think your Honor just  
10 summarized my five pages. So, I really don't -- on -- on  
11 this issue, which is exactly what the issue is. None -- it  
12 doesn't matter who saw what, what page or who saw what  
13 advertisement because we are going to show exactly that  
14 based on class-wide common evidence, that none of these  
15 websites or anything out there disclose to the objective  
16 reasonable person the average android user, that they  
17 disclose the transfers at issue, how they're going to happen  
18 or anything. So, that's exactly right. And that's why we  
19 have no issues of express or implied consent here.  
20 They're --

21 THE COURT: So --

22 MS. GIULIANELLI: -- class-wide issues. And they  
23 rise or fall maybe at summary judgment or at trial.

24 THE COURT: And I appreciate that Google's  
25 argument will be different, which is that it's not capable

1 of class-wide proof because the people who saw, you know, X  
2 disclosure will have signed up and consented because that  
3 disclosure is sufficient. So, and -- so, I will let Google,  
4 you know, argue that issue, but this is -- this is the  
5 puzzling thing to me a little bit about all of our arguments  
6 about the merits, to the extent they touch on the merits and  
7 to the extent they touch on Daubert issues, which is the  
8 threshold for class certification is different from when I'm  
9 doing summary judgment, even though you all have already  
10 completely finished your evidence development in this case,  
11 including expert evidence. So, I'll -- I'll get to that in  
12 a moment about my question about how do I deal with the  
13 Daubert motions.

14 But I would like to move on to the -- the damages  
15 theory. And the reason -- so, this is also something that  
16 the Plaintiffs must satisfy for purposes of class  
17 certification, namely -- and, you know, I have Comcast in  
18 mind -- there needs to be a model that can serve as evidence  
19 of damages in a class action that measures only those  
20 damages that are attributable -- that are attributable to  
21 the Plaintiffs' theory of liability. In other words, the  
22 nexus between the theory of liability and the damages model  
23 has to be there. They have to match. They have to measure  
24 the right thing. The model has to measure the right thing.

25 And, so, I am trying to make sure I understand what the

1 thing is that we're measuring. So, I went back and looked  
2 at the Ninth Circuit's decision, and, you know, this was a  
3 memorandum decision, and there was not a lot of elaboration,  
4 shall we say. But, nevertheless, the description on the  
5 damages theory is -- at least part of it is like a forced  
6 sale, Google's alleged surreptitious use of the cellular  
7 network through Plaintiffs' data plans causes Plaintiffs to  
8 experience an immediate discrete loss of a specific sum of  
9 valuable cellular data which is charged against their plans.

10 And I was pondering that in the contest of the parties'  
11 debate about unlimited plans, metered plans, and things that  
12 have, you know, specific limits and subject to overcharging  
13 and throttling. And I am not sure I totally understand the  
14 Plaintiffs' theory here about what the it is because there's  
15 a remark -- and I'll point you to it since I noted it --  
16 that I found a little bit puzzling in the reply brief.  
17 Let's see. This is at page two.

18 MR. SOMVICHIAN: This is the class cert reply,  
19 your Honor?

20 THE COURT: Yes. I'm sorry. We're all talking  
21 about a class cert reply. Plaintiffs claim -- and this is  
22 the middle, around line 10:

23 "Plaintiffs' claim is based on the  
24 simple fact that Google's consumed  
25 users' valuable cellular data, thereby

1           reducing the amount that users  
2           themselves could use, share with others  
3           or decide not to use. Cellular data  
4           costs money. Each byte that Google  
5           consumes is no longer available to the  
6           user who paid for it. This is true  
7           regardless of whether a user had a  
8           limited or unlimited plan. The loss of  
9           valuable property has long been  
10          recognized as a form of injury,  
11          regardless of any further consequential  
12          harm," et cetera, et cetera.

13          But then at line 18:

14                 "Plaintiffs' case is effectively  
15                 limited to cellular traffic that  
16                 carriers categorize as metered, meaning  
17                 that it is finite and not truly  
18                 limited."

19          And I had no idea what that meant. Could you please  
20          clarify what -- what you are talking about here?

21                 MS. GIULIANELLI: I -- I sure will. This -- first  
22          of all, it is a -- this is just saying that as a practical  
23          matter -- and then I will talk about our methodology. As a  
24          practical matter, for purposes of measuring damages, we  
25          measured for purposes of damages everything that Google tags

1 as metered. There's an unmetered category and metered.

2 THE COURT: Google tags it as metered?

3 MS. GIULIANELLI: Google does. Well, Google --  
4 the carriers report to Google what's metered and unmetered,  
5 and then Google's tags say metered or unmetered in what is  
6 called the Westworld data. It's a little bit of a --  
7 honestly, it's a little bit of a -- basically, for purposes  
8 of measuring damages, everything was subject to either  
9 limitations before 5G by the carriers or when Google moved  
10 in 2021 to a dataset called Westworld, the carriers started  
11 reporting it as metered or unmetered. And, so, we counted  
12 only metered as part of damages.

13 THE COURT: On a user-specific basis the carrier  
14 would say this data transfer on this user's phone using this  
15 user's data plan is metered versus unmetered?

16 MS. GIULIANELLI: Yes, for the Westworld data,  
17 which starts in 2021.

18 THE COURT: And what does that mean?

19 MS. GIULIANELLI: That means -- it means that the  
20 carrier is metering it and counting it against a plan.  
21 Basically, it's -- it's just another form of -- it's a form  
22 of count -- of being limited.

23 THE COURT: So, it's a form of counting? It's  
24 just counting?

25 MS. GIULIANELLI: Yes. It's saying that this is a

1 metered plan.

2 THE COURT: And what does that mean from -- maybe  
3 it depends on the carrier, but what does that mean from the  
4 carrier's perspective? Because the carrier maybe has like  
5 -- doesn't care about this case at all and just cares about  
6 its own business. And, so, what is the carrier indicating  
7 by metered versus unmetered? If you know, like, is that  
8 known in the case?

9 MS. GIULIANELLI: I mean, Mr. Summers wants to say  
10 something, and I want to talk about -- because I'm not sure  
11 this actually matters a lot to the methodology -- to the  
12 methodology.

13 MR. SUMMERS: This is an issue that -- that I have  
14 a little more detailed knowledge, and then I'll refrain from  
15 tag teaming.

16 The -- on this issue, so, what has happened over time,  
17 traditionally when unlimited plans came out, the still were  
18 subject to throttling limits and/or overcharges. So, they  
19 were called unlimited plans, but they still had specific  
20 caps. In more recent years, the carriers have introduced  
21 premium unlimited plans that don't have these hard caps.

22 Traffic that is counted as unmetered is either WiFi or  
23 traffic that is on a premium 5G plan that the carriers  
24 consider more to be a truly unlimited plan. So, the bottom  
25 line, the point we are making in the brief here is that when

1 we limit our damages case to metered traffic, to the extent  
2 the users have so-called unlimited plans, they are unlimited  
3 plans that have -- that typically have severe throttling or  
4 overcharge caps. We're not dealing with any plans that are  
5 truly are more properly characterized as unlimited in  
6 nature. That traffic is actually treated as unmetered and  
7 is not included in our case like WiFi traffic.

8 THE COURT: Okay. So, could I just like follow up  
9 on that? So, are the Plaintiffs telling me that the only  
10 data transfers that are the subject of this action, this  
11 class action, are ones where if a user is in the position of  
12 exceeding a certain threshold, whatever it may be, there  
13 will either be a reduction in performance, the throttling,  
14 or an overcharge?

15 MR. SUMMERS: Generally speaking, yes. That is  
16 all -- our case is limited to what the carriers define as  
17 metered traffic, which generally means it is being counted  
18 against a cap.

19 THE COURT: Counted against a cap, but --

20 MR. SUMMERS: But it is finite.

21 THE COURT: But your -- your argument doesn't  
22 depend on that cap getting exceeded?

23 MR. SUMMERS: Correct. We're not seeking damages  
24 based on overcharges. We're not --

25 THE COURT: So -- so, in other words, like --

1 MR. SUMMERS: We're not getting into throttling  
2 or --

3 THE COURT: -- you could have like a metered plan  
4 that has like so much data available that like a typical  
5 user would never ever even approach it even with Google  
6 doing its data transfers. Nevertheless, that would be  
7 within the scope of the class action? Because it's metered,  
8 you can count?

9 MR. SUMMERS: It would. And we are simply  
10 counting everything that is metered and not counting  
11 anything that is unmetered. Correct. If it's --

12 THE COURT: And how do you --

13 MR. SUMMERS: -- counted and finite --

14 THE COURT: Okay.

15 MR. SUMMERS: -- it is included in the case. If  
16 it is not counted and is not -- you know, that some in a  
17 sense treated by the carriers as not being finite, it's not  
18 in the case. And --

19 THE COURT: And --

20 MR. SUMMERS: -- this goes to the nature of the  
21 property.

22 THE COURT: Yeah. And --

23 MR. SUMMERS: We're dealing with a finite  
24 property, that there is a limitation.

25 MS. GIULIANELLI: And that -- and that was the --



1 and that was the counting of damages, specifically what your  
2 Honor was asking about.

3 THE COURT: Okay. But does -- does that exclude  
4 certain class members who would otherwise be in the case?

5 MS. GIULIANELLI: No.

6 THE COURT: How do I understand the class  
7 definition?

8 MS. GIULIANELLI: Yeah. So, the class definition  
9 -- and I think this is the -- the confusion and why your  
10 Honor's asking about this. So, the class definition is all  
11 users of android phones during the time period -- I think  
12 it's November 2017 -- to the present, because all of them  
13 had their data converted and all of them suffered harm,  
14 whether or not they were on a so-called unlimited plan, and  
15 the evidence at trial is going to show, just as it did in  
16 Chupo (phonetic), that there's nothing -- it's not like air.  
17 There's no such thing as a true unlimited plan, right.  
18 There's always network congestion, and carriers count all of  
19 the data. They do count it. They measure it. It can be  
20 precisely measured. It can be throttled. We don't need to  
21 determine whether or not a specific individual was throttled  
22 because they are all part of the class, and they have all  
23 suffered harm because of the nature of the property and the  
24 conversion here. And, so, the class definition is all users  
25 of android phones who have suffered harm regardless of the

1 type of plan that -- the thing that carriers marketed,  
2 whether they marketed it as unlimited or not. And that's  
3 consistent with the Ninth Circuit's opinion.

4 THE COURT: But you say you've excluded meter --  
5 people who don't have unmetered -- the carrier doesn't  
6 identify them as --

7 MS. GIULIANELLI: No, I know.

8 THE COURT: -- unmetered.

9 MS. GIULIANELLI: That's what I was --

10 THE COURT: So, like how do I -- is that a subset  
11 of your class definition or --

12 MS. GIULIANELLI: No.

13 THE COURT: -- am I just relying on your good  
14 faith to tell me those people aren't in there? What --

15 MS. GIULIANELLI: And I think that's where we got  
16 confused. This is just the damages calculation, and the  
17 damages calculation, the point is it was extremely  
18 conservative. And, so, for purposes of calculating damages,  
19 we only counted the metered, and that's just because we  
20 couldn't tell based on the way -- one of the reasons Google  
21 keeps it -- whether unmetered is WiFi or something else.

22 So, for purposes of --

23 THE COURT: Oh, you --

24 MS. GIULIANELLI: -- damages calculation, but  
25 they're not excluded from the class.

1 THE COURT: Okay. But if there is class  
2 certification, you're going to give notice to class members.  
3 And if class members haven't been -- aren't a member of the  
4 damages class, isn't that a problem?

5 MS. GIULIANELLI: No. It's -- it's not. It's not  
6 a problem because the -- it's just a way of calculating the  
7 damages in a way that's conservative. So, as Mr. Summers  
8 said, there's the unmetered, which could be a lot of WiFi.  
9 They're not part of the class. It's users who use their  
10 cellular data, whether it was limited or unlimited.

11 THE COURT: So, I -- so, my understanding of the  
12 present contention that the Plaintiffs have is that it  
13 doesn't matter whether it was metered, unmetered, throttled,  
14 not throttled, whatever. Any data that is mine that Google  
15 used counts, and we have to value it?

16 MS. GIULIANELLI: Correct.

17 THE COURT: That's -- that's it. No matter what,  
18 whether there was economic harm otherwise or not, it's --  
19 it's a widget, and you took it from me?

20 MS. GIULIANELLI: That is correct. And we would  
21 say that there's always economic harm and there's always  
22 actual injury because the --

23 THE COURT: Well -- right.

24 MS. GIULIANELLI: -- taking of property is injury.

25 THE COURT: That's --

1 MS. GIULIANELLI: But that is correct.

2 THE COURT: I understand that that's -- that's the  
3 theory. So, okay. So -- so, then your -- your -- the way I  
4 understand your argument then is that the project is to  
5 value that but the -- the factual basis for coming up with  
6 value uses -- maybe subset isn't the right word but uses  
7 only the data that is identified as metered to do the  
8 valuation?

9 MS. GIULIANELLI: That is correct. And I think it  
10 -- that is correct because unmetered includes WiFi and --  
11 and some of the new 5G plans. So, it's a conservative  
12 damages calculation.

13 THE COURT: Okay. All right. I think -- I think  
14 I get that.

15 MS. GIULIANELLI: But I see why that's confusing.

16 THE COURT: Yes. Okay. So, this gets in a little  
17 bit to the Daubert issue I think, and I'm just going to ask  
18 this question out loud. The -- the thing that I found most  
19 compelling about Google's argument on the Daubert damages is  
20 that the Plaintiffs' experts don't seem to be valuing the it  
21 that you have described to me as the converted data. They  
22 are valuing other things, bigger things, broader things.  
23 But I want to make sure that I really understand the  
24 Plaintiffs' argument. So, in other words, the marginal data  
25 theory really resonated with me, that you should be trying

1 to value the value of that marginal data and not all the  
2 other stuff that might go into the plan. Like total  
3 revenues divided by total usage to me seemed like not a  
4 reliable methodology, but, you know, that said, it's not --  
5 it's not a question -- I agree that it's not a question of  
6 has a given user suffered economic harm. That's -- that's  
7 not the question. I think that's -- although there is this  
8 alternative damages theory, which I'll -- I'll get to in a  
9 moment, but I'm just trying to understand how -- how these  
10 numbers that your expert has proposed in his damages report  
11 actually are measures of the data that's been converted, and  
12 one of the questions I had looking at the jury instructions  
13 formulation is in this context, where you're trying to value  
14 the value of this bit of data that's been transferred, who  
15 is the willing buyer? Who is the willing seller? And I  
16 don't mean like is there actually a market, but who are  
17 these people in the hypothetical market that were instructed  
18 to apply? And I'm not sure of who's going to answer that  
19 question. But, Mr. Summers, if that's -- if that's on your  
20 plate, I'll hear from you.

21 MR. SUMMERS: Sure. Well, I do think this is a  
22 battle of the experts, your Honor. And Doctor Etner  
23 (phonetic) testifies that the primary market is the market  
24 that matters, that we should look to the price consumers pay  
25 when they buy cellular data from the carriers. He expresses

1 that opinion. There's an active market. We have pricing  
2 data. Doctor Gos, on the other hand, argues that we should  
3 look at the secondary market and wonder, ask the  
4 hypothetical how much would a consumer charge Google.  
5 Doctor Etner responds to that and says, We don't -- that  
6 there is no active market there. We don't have data, and I  
7 think it's a battle of the experts, and it's for the jury to  
8 determine, and there's evidence going both ways. But I -- I  
9 don't think --

10 THE COURT: See, I'm troubled by that because --  
11 for two -- two reasons. First of all, the damages model has  
12 to match the liability theory. So, if the liability theory  
13 is one thing, then the damages model has to value that.  
14 And, secondly, the case law says there doesn't have to be an  
15 actual market. What we are trying to do is use the  
16 information that we have to say in the hypothetical world  
17 what would be the fair market value of this thing, but you  
18 can't say, Well, there's no market for that thing.  
19 Therefore, we're going to value some other thing which has  
20 not matched your liability theory. And that's where I  
21 really struggled, because it seems to me like there is  
22 evidence in the world from which experts could necessarily  
23 agree but could infer the value of the thing that is  
24 actually converted. And, so -- so, I was -- I was troubled  
25 by the idea that, well, we're going to value something else.

1 And -- and, so, that's why I come back to the question  
2 who's the willing buyer and who's the willing seller in this  
3 scenario? Like who would they be?

4 MR. SUMMERS: Well, your Honor, I think it's  
5 important to understand we're dealing with the same thing.  
6 There's one thing, right. We are dealing with the  
7 transmission of cellular -- of information over the  
8 carrier's cellular network, right. Regardless of who the  
9 buyer and the seller is, we're dealing with a commodity.  
10 Doctor Etner testifies -- proffers the opinions in his  
11 supplemental report with a relatively homogenous commodity,  
12 and, so -- so, the -- there's no dispute about what is being  
13 measured here.

14 And what Doctor Etner does is he does precisely what  
15 the industry does in calculating the average price of  
16 cellular data looking at the revenue and the amount of data  
17 transmitted to come up with an industry average price for  
18 cellular data.

19 There's no reason to think that if a consumer were the  
20 seller and Google were the buyer, that they wouldn't look to  
21 the same data that the telecommunication --

22 THE COURT: Maybe --

23 MR. SUMMERS: -- centers would look to.

24 THE COURT: -- that's true. Maybe that's true.  
25 Maybe that last thing that you said is true, but we still

1 have to start with the point of like who's the willing  
2 buyer, who's the willing seller, and I'm looking again at  
3 your reply brief where the claim is based on the simple fact  
4 Google consumed users' valuable cellular data, thereby  
5 reducing the amount that users themselves could use, not  
6 use, share with others that data.

7 So, that's what we're valuing, what is the fair market  
8 value of the data that users could have used themselves, not  
9 used, or shared with others.

10 MR. SUMMERS: And the evidence remains the same,  
11 your Honor, regardless of who the parties to this  
12 hypothetical are. There is -- consumers pay a certain  
13 amount of money for their cellular data. If they had access  
14 to the full information, they would know that Google is  
15 using a portion of it, and there's every reason to think  
16 that they would expect the fair market value of their  
17 cellular data.

18 THE COURT: Okay. So, you --

19 MR. SUMMERS: Which Doctor Etner has quantified.

20 THE COURT: So, the -- okay. But in the -- in --  
21 if we're going to apply the methodology that we're  
22 instructed to under California law, the -- the willing buyer  
23 is Google, and the willing sellers are the people who have  
24 the phones and have the data plans. Is that how I'm to  
25 think of it?



1           MR. SUMMERS: I don't think so, your Honor. I'm  
2 not sure that it -- ultimately, I'm not sure that it  
3 matters, but I don't think so. We're dealing with -- if we  
4 were looking at stocks, we would -- we would be looking at  
5 the quotations for stocks over the -- over a day or some  
6 period of time to determine what class rights was. We would  
7 not look at who the buyer is specifically, who the seller  
8 is. We would look to the market. And that's exactly what  
9 we're doing here. We have a commodity that is bought and  
10 sold by hundreds of millions of people every day from a  
11 large number of carriers. There is an established market  
12 price. There are variations, just as there are buying  
13 stocks any given day. There can be variations, and you  
14 might get a better deal, you know, on a certain platform  
15 than another. But there is a market that is relatively  
16 efficient. There is an established market price. That is  
17 what Doctor Etner says. That is what he estimates and  
18 quantifies for the telecommunications industry every two  
19 years, and it's tracked.

20           So, the idea that we should look at a hypothetical  
21 transaction between a specific consumer and Google, I'm not  
22 sure that's what the jury instruction or the relevant law  
23 requires. I think we're to look at this more from the  
24 perspective of market, what's the fair market value. And  
25 the fact that we're to look at the highest price suggests

1 that we don't look at a particular transaction that would  
2 drive a lower price. We're looking at the value of a  
3 commodity, of an article --

4 THE COURT: Yes.

5 MR. SUMMERS: -- of commerce.

6 THE COURT: That's the thing is I agree we're not  
7 supposed to look at specific transactions, although, those  
8 specific transactions like specific data plans may be  
9 evidence of what the fair market value is, and the hundreds  
10 and hundreds of different transactions out there in the  
11 universe about the value of a particular byte of data or a  
12 data plan with, you know, certain limits or -- or not may be  
13 evidence upon which an expert could rely to come up with a  
14 fair market value. But we still have to figure out what  
15 we're valuing, and I don't think it's -- I don't think it's  
16 like stock to say publicly traded stock is going to be the  
17 same price on a given day for anybody buying or selling it.  
18 This is not like that. This is a user's property. And  
19 while you can maybe do it on an aggregate basis and have,  
20 you know, class-wide evidence of it, it's not in the same  
21 scenario as when a -- if there were a conversion claim that  
22 Google was stealing from the carrier, okay. But Google is  
23 not alleged to be stealing data from the carrier. Google's  
24 alleged to be sealing data from the user. So, we should be  
25 valuing that, and that's why I felt like the framing of the

1 marginal value was an important distinction over what your  
2 expert's methodology was, and I was worried about that  
3 because your expert seems to be valuing something other than  
4 what is converted.

5 MR. SUMMERS: On that, your Honor, I would  
6 disagree. Look, we calculate the precise amount of cellular  
7 data being consumed by Google for the challenged transfer,  
8 and they track this. Every single transfer is actually  
9 tagged and tracked, whether it's metered --

10 THE COURT: Got it.

11 MR. SUMMERS: We -- we calculate the exact quantum  
12 that Google has converted for its own purposes, and our  
13 experts then determine the market value, the fair market  
14 value of that data using the industry accepted methodology  
15 that the industry uses.

16 THE COURT: What's the industry accepted  
17 methodology that you're referring to?

18 MR. SUMMERS: Doctor Etner's average --

19 THE COURT: Total revenue divided by total data  
20 usage?

21 MR. SUMMERS: It's -- essentially, yes, that is  
22 the -- that is the model that Doctor Etner uses. Every two  
23 years, he prepares a report for the cellular  
24 telecommunications industry association with all the  
25 carriers and Google members. They then utilize this data

1 and publish reports to their members, and the -- and the  
2 industry tracks this and a lot of other --

3 THE COURT: Okay. But that --

4 MR. SUMMERS: -- related data.

5 THE COURT: -- is for that industry, right. And  
6 they're offering services in addition to just the data. So,  
7 that's the critique that I -- I'm not entirely sure I  
8 understand Plaintiffs' rebuttal to, which is that if you're  
9 looking at total revenue and not accounting for some of  
10 these other services that go in there, that you may be over  
11 valuing -- and I'm not talking about the Google Fi thing at  
12 the moment. I'm talking about the sort of principal  
13 methodology. You will be over valuing the marginal  
14 incremental value, because google's not stealing the entire  
15 data plan. Google is stealing, according to Plaintiffs,  
16 this quantum or whatever the word the Ninth Circuit used,  
17 you know, the specific sum of valuable cellular data, not  
18 the subscription to Netflix, not other things, but the  
19 particular cellular data that is needed to do this transfer  
20 that Google is doing for its own benefit, just kind of  
21 paraphrasing there.

22 MR. SUMMERS: Right. And, to be clear, Doctor  
23 Etner does perform steps to exclude revenue attributable to  
24 other services from his calculation of the average cost of  
25 data. So, he -- beginning in -- in 2013, the carrier

1 stopped providing breakdowns of service revenue and  
2 allocating the apportion to data.

3       And, so, what he does, though, is he takes that  
4 proportion. He carries it forward. Now, we know the data  
5 has been growing rapidly, the use of data, whereas the use  
6 of voice has been flat. And we know from his report -- his  
7 supplemental report that data has increased 91 percent  
8 premier on an average compounded annual basis. What he does  
9 very conservatively is he takes the ratio of data to voice  
10 and -- and text messaging, applies a very con -- and this is  
11 the 50 percent estimate that they complain about, saying  
12 that there were, you know, telephone discussions or  
13 conversations with the carriers involved. It's a very  
14 conservative way of over estimating a portion of the revenue  
15 that should be allocated to voice and text messaging and to  
16 other services and not to data -- QuaData. And he does  
17 that, and he then takes those two different approaches.  
18 One's called the disaggregated. One is called the bundle,  
19 and he uses a blended average where he actually uses the  
20 specific ratio of the carrier's transmissions and the extent  
21 to which everything is now data versus using voice over,  
22 LTE, versus the traditional -- and he -- and he uses these  
23 two approaches to estimate and to disaggregate from his data  
24 points of data an amount attributable to traditional  
25 services like voice and instant -- and -- and traditional

1 text messaging. And he also addresses the issue of  
2 subscription, saying that doesn't sweeten it, there's no  
3 specific allocation. So, he's addressed all those issues,  
4 and he's -- he's brought down the number. He does this both  
5 for CTIA, and he's used the exact same methodology here. He  
6 basically just took his CTIA methodology and updated it for  
7 this case, done the exact same thing here to actually come  
8 up with an estimate of the value of the data per se and  
9 nothing else. And -- and it is in his judgment -- and he's  
10 expressed opinions. Again, I'd direct the Court to his  
11 supplemental report -- that it is a -- a fair and reasonable  
12 estimation of the fair market value of cellular data and  
13 that it represents a very conservative measure because  
14 purchasers are paying a lot more than the average.

15 Now --

16 THE COURT: So, do you take issue with Google's  
17 argument that what should be valued here is the marginal  
18 cost of the data? I'm trying to under --

19 MR. SUMMERS: Absolutely. The --

20 THE COURT: So, what's the difference? What --

21 MR. SUMMERS: And I went through a trial --

22 THE COURT: Wait, wait, wait.

23 MR. SUMMERS: -- a few weeks ago where they  
24 presented that theory.

25 THE COURT: What's -- wait. Just a moment. Just

1 a moment. What's -- I don't -- I actually don't want to  
2 hear about Chupo too much, but I -- and who won and who  
3 didn't. I want to understand what the argument is. So,  
4 what is the difference between the marginal value of some  
5 increment of data and what you're arguing is the fair market  
6 value of the data, QuaData? Like what is the difference  
7 there?

8 MR. SUMMERS: To -- it's difficult to answer that  
9 question without explaining the convoluted approach their  
10 expert uses. What their expert does -- does is he trades  
11 Google's data as the last data being purchased. And his  
12 idea is, Well, if a consumer is already buying all of this  
13 data, as you buy more and more data, the price per gigabyte  
14 or per megabyte or per byte goes down. And, so, he actually  
15 looks at different plans and says, when you get to bigger  
16 plans, you pay less per gigabyte than with smaller plans.  
17 He makes that adjustment in his report, which, again, goes  
18 to the reliability of the methodology he --

19 THE COURT: You're talking about Google's expert?

20 MR. SUMMERS: Correct, Gos.

21 THE COURT: Okay.

22 MR. SUMMERS: -- actually makes an adjustment for  
23 that and adjusts Etner's number down, which, again, I think  
24 the fact that they're able to do that and to quantify both  
25 ways shows that this is something for the jury and not a --

1 a fundamental reliability issue that warrants Daubert.

2 They're able to do the calculus, and they actually bring  
3 down based on that adjustment and one other, Etner down by  
4 92 percent.

5 THE COURT: Yeah. No, so, apart from just  
6 disagreeing about the numbers, like, I'm -- what I'm really  
7 trying to get to -- and I'm sorry for belaboring this point,  
8 but it -- I feel like it's kind of important for me to  
9 understand. It's like what -- as a matter of sort of theory  
10 or like how are you conceiving of the -- what you're  
11 measuring. How is -- what is the difference between  
12 marginal versus what you're doing?

13 MR. SUMMERS: Our -- our point would be there is  
14 no difference because cellular data has a price in the  
15 market that the industry tracks and follows and understands,  
16 and it is priced on a per-gigabyte basis, and the -- we  
17 quantify the specific sum Google uses. We can't say that  
18 Google's is the last rather than the first. Google is doing  
19 these transfers every single day, the first day of the  
20 billing cycle, Google last. It's an overhead. You treat  
21 the overhead as the first or the last. They would say it  
22 should be last, and be --

23 THE COURT: Whether it's first or last --

24 MR. SUMMERS: -- marginal. We would say --

25 THE COURT: Sorry. Whether it's first or last



1 doesn't really seem to matter, but would -- would we all  
2 agree that -- maybe this is a wrong assumption on my part  
3 but that for a given user, maybe like a typical user, they  
4 consume a certain amount of gigabytes per month and that  
5 whatever Google is doing is like -- it's kind of a small  
6 subset of whatever that user has done. Maybe if the user  
7 has a lot more, Google has a lot more. But if a user is  
8 using it -- his or her phone infrequently, maybe Google's  
9 data transfers are less frequent as well. I'm not sure.  
10 This -- I'm asking is this a fair assumption on my part that  
11 -- that as a matter of proportion, Google's data transfers  
12 are a small -- the subjective word -- subset of the overall  
13 data usage of that user's phone in a given month?

14 MR. SUMMERS: Yes, Google's utilization is a small  
15 -- relatively small portion of the overall utilization by  
16 the phone in a given month. That is true. It's not  
17 necessarily a one-to-one correlation in the terms of the  
18 magnitude of the usage of the phone and the -- the magnitude  
19 of these transfers. For example -- for example, location  
20 uploads, those do not include any location-based information  
21 that's actually triggered by user, right. And that's when  
22 your phone is just completely idle.

23 THE COURT: So, it's independent?

24 MR. SUMMERS: You move 200 meters, it's going to  
25 start using your phone to map the world.

1 THE COURT: Okay.

2 MR. SUMMERS: And using your phone as a mapping  
3 device.

4 THE COURT: Um-hmm.

5 MR. SUMMERS: So, that is all true, but the fact  
6 remains that under the applicable law and the pattern  
7 instruction, we are to determine the fair market value.  
8 That is an objective measure.

9 THE COURT: Um-hmm.

10 MR. SUMMERS: Our experts look at objective real  
11 world data about pricing. What actual consumers pay in the  
12 actual market, that is -- that is a primary market, but  
13 there's no reason to think -- there is -- there is a bit of  
14 a secondary market. Traditionally, there has been a way of  
15 selling through hot spots data. It's -- it's sort of kind  
16 of going away over time. Like data was much more precious,  
17 you know, 10 or 15 years ago and much more expensive per  
18 gigabyte. But there has been -- but there's -- there's no  
19 reason to think that there's any delta between the two.  
20 And, interestingly, both experts agree that you can look at  
21 the primary market for -- for determination of the fair  
22 market value. That's not really a focal point of this  
23 agreement.

24 THE COURT: Well, it's -- and it's agreement on  
25 what evidence you can look at but not necessarily -- I

1 perceive the -- I thought that was the case, but I -- I  
2 perceive now that there's a difference in terms of the  
3 model, and that's going to bring me to my last question, and  
4 then I really probably should hear from Google. They're  
5 just sitting there very patiently, but I don't want to short  
6 circuit things, but, so, bear with me.

7       Section -- Civil Code Section 3336 has two parts, the  
8 detriment caused by the wrongful conversion of personal  
9 property is presumed to be, first, the value of the property  
10 at the time of the conversion with the interest from that  
11 time or, an amount sufficient to indemnify the party injured  
12 for the loss, which is the natural, reasonable, and  
13 proximate result of the wrongful act complained of, et  
14 cetera, et cetera.

15           UNIDENTIFIED SPEAKER: Right.

16           THE COURT: Okay. So, I finally understood from  
17 reading the Daubert briefing that, in fact, there's a  
18 disagreement between the parties. Plaintiffs have a theory  
19 of damages that goes with the value of the property at the  
20 time of the conversion, and then -- and Defendant tries to  
21 rebut that in terms of the actual number but also is arguing  
22 an amount sufficient to indemnify the party injured for the  
23 loss, which is the natural, reasonable, and proximate  
24 result.

25       So, okay. I -- you know, those two theories can live

1 in the world and -- and I think Google's right that in --  
2 under the case law in appropriate circumstances, that -- I'm  
3 going to call it second part of the way to value conversion  
4 damages could be available.

5 But what I'm -- what I'm sort of struck by in reading  
6 this text is that the party injured by the loss. The party  
7 injured by the loss is the user. In Plaintiffs' theory, the  
8 party is injured like across the board, regardless of plan,  
9 by having their data used. I get that. That's what the --  
10 the law requires, that being deprived of your property, in  
11 this case the data, is the injury, and we're valuing that.  
12 And there can be additional -- there can be an alternative  
13 theory that says, Okay. But if you compare that loss to the  
14 economic loss the party experienced, then somebody's getting  
15 a windfall. This is unfair, unjust, et cetera, and there's  
16 case law that allows for potentially -- I mean, it's from  
17 1965. I haven't gone and looked, but whatever. I haven't  
18 drilled down into that particular issue, but those -- those  
19 -- let's just say those -- those two competing theories of  
20 damages could live in the world. I still think what we have  
21 to do is ask what's the fair market value in the right  
22 scenario, meaning the party who has the data, possession of  
23 the data. The party who has possession of the data, what is  
24 the fair market value of that property, not the carrier, but  
25 the party who has possession of the data, and I just -- I'm

1 just struggling with that point honestly.

2 MS. GIULIANELLI: Your Honor, it may help actually  
3 to -- to point your Honor to the actual slide 21 and --

4 THE COURT: Okay.

5 MS. GIULIANELLI: -- slide 22.

6 THE COURT: In the Daubert --

7 MS. GIULIANELLI: In the -- actually, it's in  
8 class cert, but it goes to the question, and I think it will  
9 help answer this.

10 THE COURT: Um-hmm.

11 MS. GIULIANELLI: And this is the jury instruction  
12 based on California law, and it goes to the question of what  
13 the it is. What is the property? It's a byte. A byte is a  
14 commodity. A byte is a byte. It can be valued. There is a  
15 fair market value, and the jury instruction said the highest  
16 price a willing buyer would have paid to a willing seller.

17 And, so, if your Honor goes to the next slide --

18 THE COURT: No. Wait. Wait. Before we go to the  
19 next slide, and, two, if the buyer and seller know all the  
20 uses and purposes for which the cellular data is reasonably  
21 capable of being used.

22 MS. GIULIANELLI: Correct.

23 THE COURT: And you've defined that for me as use,  
24 not use or share.

25 MS. GIULIANELLI: Yes. And, so, it's basically

1 what a -- if -- if someone had full information like a  
2 hypothetical one person had full information about how it  
3 was going to be used, Google, what they would sell it for.  
4 It's -- it is not the value of the property to any  
5 particular individual under California law.

6 THE COURT: But what about the category of users?  
7 The market is -- the hypothetical market is this category of  
8 users who have -- have purchased cellular data via their  
9 plan and have this valuable cellular data that they think  
10 they can solely use or control, and now somebody's coming  
11 and taking it, and what would they have told it for? It's  
12 like -- forgive me. I'm going to introduce a thing that is  
13 probably not appropriate to introduce now, but like the  
14 privacy litigation. I have my private data. I don't think  
15 anybody's supposed to take it. Mr. Somvichian can plug his  
16 ears right now, but -- but what's the value of the -- that  
17 private data?

18 MS. GIULIANELLI: Well, you --

19 THE COURT: It's not to -- it's to the user,  
20 right?

21 MS. GIULIANELLI: Right. And, so, you can look,  
22 and then Mr. Summers will get back to -- to Doctor Etner.  
23 Some of this overlaps with class cert, but one -- one of the  
24 ways -- you can look at evidence of the actual value sold in  
25 the marketplace to see what a willing buyer would have paid

1 for it, and we have a couple of benchmarks.

2 THE COURT: Yeah.

3 MS. GIULIANELLI: One is the average price of data  
4 that Doctor Etner calculated, and then the other benchmark  
5 is the Google Fi price, and that's actual data that was sold  
6 in the marketplace to -- by a willing seller to a willing  
7 buyer in the marketplace. So, both of those are benchmarks,  
8 and they're both evidence because you can use market data as  
9 evidence of --

10 THE COURT: Sure.

11 MS. GIULIANELLI: -- what a willing buyer -- so,  
12 both of those are benchmarks, and both are -- apply on a  
13 class-wide basis because it's not to any individual.

14 THE COURT: And is this only -- or if there is a  
15 -- there is reliable evidence that this data is a commodity  
16 in the way that you've described it -- people have been  
17 throwing that word around, but -- but I'm not sure the  
18 commodity that you're using it means what you think it  
19 means.

20 So, you know, from an economic perspective, a commodity  
21 is like really fungible. It can be -- you know, I'm not  
22 sure this is fungible. Is -- is that the -- is that like --  
23 is your theory of fair market value dependent on the  
24 assumption that it's fungible? It's a -- it is a commodity?

25 MR. SUMMERS: I think that is a relevant

1 consideration.

2 THE COURT: Okay.

3 MR. SUMMERS: I'm not sure if the test depends on  
4 it. Again, Doctor Etner is providing the average price of  
5 cellular data, the way the industry tracks it. That is an  
6 average. It embraces all plans high and low, and it  
7 reflects -- it's a great -- as he explains, it's a reliable  
8 input to determine on a class-wide basis what the fair  
9 market value of the data consumed would be. I mean, you  
10 can't think of a better match. An average calculated the  
11 way the industry tracks it to apply to this broad set of  
12 transfers using a number of plans.

13 But, to the extent it matters, Doctor Etner at  
14 paragraph 12 of the supplemental report explains that it's a  
15 homogenous good, that it's mostly fungible, that the price  
16 does not -- does not significantly differ between the  
17 carriers, and in his trial testimony, which Google included  
18 -- in fact, it's -- it's attached as Exhibit A to the  
19 Somvichian reply declaration -- at page 1167 of the Chupo  
20 trial transcript -- and I think this is akin to deposition  
21 testimony for this case -- he was asked the question:

22 "Q In general, when someone buys  
23 cellular data on one network, are they  
24 buying the same thing for a different --  
25 same thing or a different thing than



1           when they buy cellular data on a  
2           different network?

3           A       Typically, they buy the same  
4           thing. You access the Internet. You  
5           watch a video. You send an email. A  
6           byte is a byte. The networks have  
7           become very similar in most places."

8           And what he explained is that if you look at the three  
9 carriers and look at their coverage now, their coverage is  
10 largely comparable. Their speeds are largely comparable.  
11 To most users they are fungible. And the secondary carriers  
12 typically have arrangements where they're piggy backing on  
13 the big carriers.

14           THE COURT: Okay.

15           MR. SUMMERS: He said in a specific instance you  
16 might live in a place where the -- the T Mobile service,  
17 you're just missing their cell or whatever and you don't  
18 have good -- and -- and for you, Verizon might be better.  
19 For someone else it might be different. On an individual  
20 basis, there may be idiosyncratic reasons why a particular  
21 user prefers a different carrier, but he says in general --  
22 in general, these are -- this has become a commodity.

23           THE COURT: Okay. That's helpful. I am going to  
24 give you a few minutes just to kind of highlight any  
25 particular things. I know we didn't go through the whole

1 deck, but I really do need to hear from Google before we --  
2 we get too far longer into the morning. So, whichever  
3 points you wish to highlight, but, you know --

4 MR. SUMMERS: Just --

5 THE COURT: -- pick your most important points.

6 MR. SUMMERS: Just, again, regardless of -- on the  
7 damages, regardless of what the market is --

8 THE COURT: Um-hmm.

9 MR. SUMMERS: -- and how we should look at it --  
10 and that may be something that we need to explore further at  
11 summary judgment and for jury instructions and as the case  
12 evolves. But all of the data that we have presented is  
13 relevant regardless of how you slice it and dice it, and  
14 it's all reliable. Doctor Etner is looking at industry  
15 average figures, the way the industry calculates it using  
16 the exact same methodology.

17 By the way, they -- they raised some concerns about  
18 some conversations. Just so the Court is aware, he  
19 addresses that in his supplemental report. We're talking  
20 about a very small issue, the allocation of how do we  
21 estimate some value to voice and traditional services that  
22 doesn't go to the big numbers. And -- and he testified, if  
23 you look at Exhibit 7 to the Bell declaration, that that  
24 issue would have a very small impact on his calculus.

25 As to the Google Fi number, that \$10 per gigabyte

1 number, that's a plan that was in existence during the  
2 entirety of the class period from before it started to the  
3 present, \$10 per gigabyte, and millions of consumers have  
4 been paying that for -- these are data points that are  
5 relevant regardless of the exact question of who the buyer  
6 is and who the seller is. This is all data about the fair  
7 market value which, again, is an objective inquiry. This is  
8 all relevant to the jury's consideration of these issues,  
9 and you couldn't find a more reliable approach than looking  
10 at real world transactions, real world pricing, real world  
11 data about what happens in the marketplace. This is not  
12 some sort of crazy, you know, science or -- or an expert  
13 just saying something. He's -- he's using real world data.  
14 And the fact that they're able to address -- and this goes  
15 to the Thompson Daubert as well on both damages motions,  
16 damages is attacked.

17       They're able to quantify adjustments for every  
18 conceivable error that they see in both Etner and Thompson.  
19 The fact that they're able to do that tells you that the  
20 fundamental methodologies here are sound, and we can quibble  
21 about how they should be applied, but we're not dealing with  
22 ipse dixits from an expert or -- or any sort of, you know,  
23 voodoo science.

24               THE COURT: Um-hmm. Okay. Thank you.

25       Let me turn to Google now. And, so, you have a preview

1 from our -- this colloquy of what the things are that I'm  
2 most concerned about, both about the -- what the it is in  
3 terms of what was transferred allegedly without permission  
4 and also whether the damages model maps appropriately to the  
5 theory of liability. Those are kind of like big picture of  
6 the things I'm most concerned about.

7 So, I'd be delighted if you would address those but  
8 also other matters that you would like to address.

9 MR. SOMVICHIAN: Yes, your Honor. Thank you.

10 Before I start, how -- how much time do I have so I can  
11 pace --

12 THE COURT: I'm here for --

13 MR. SOMVICHIAN: -- myself?

14 THE COURT: -- how long -- I do want to make sure  
15 you -- if people need a break, we can take a break, but I'm  
16 here until -- I'm available till 1.

17 MR. SOMVICHIAN: Okay.

18 THE COURT: So, I don't want to short circuit your  
19 time.

20 Does anybody need to take a break now? Would you like  
21 a break?

22 (No audible response.)

23 THE COURT: All right. Please go ahead.

24 MR. SOMVICHIAN: Thank you, your Honor.

25 Let -- let me start where we started this morning,

1 which is the question of what -- what -- what is the  
2 challenged conduct that we're trying to identify here  
3 because that -- that dovetails with the Comcast issue, do  
4 the damages properly tie to the wrongful conduct. It ties  
5 to other aspects of consent.

6 And I think what came through loud and clear in -- in  
7 this morning's dialog is how immensely complex this is and  
8 how many different variations, permutations and different  
9 context in which these transfers can apply. And it is not  
10 nearly as simple as counsel tried to make it seem.

11 Let's take the Clearcut example.

12 THE COURT: Um-hmm.

13 MR. SOMVICHIAN: Right. It's a thousand -- it's  
14 over a thousand logs, and they want to point to certain  
15 common characteristics that say, Well, these are -- these  
16 can all wait for WiFi. They -- they never need to use  
17 cellular data. Well, that depends on the log, your Honor.  
18 Some of these are crash reports. Some of these are needed  
19 urgently to determine the health of the ecosystem so Google  
20 can take care of urgent, pressing issues. That's part of  
21 the Clearcut logs. That might -- our defense to that might  
22 be different from something like a battery usage log that's  
23 intended for longer term optimization efforts by the  
24 company.

25 The point is it matters, and all of them, the thousand

1 plus, all roll up into the same tag. So, when they're  
2 measuring the wrongful conduct, they're measuring all of  
3 that all together without any way to parse among the  
4 different use cases.

5 THE COURT: Well, let me ask you that. Is there a  
6 way that Google can parse between them? Because there --  
7 there is authority for the idea that if there is some  
8 overinclusiveness, that's not necessarily going to defeat  
9 class certification, if there's some things in there that  
10 can be accounted for. But if it's on a user-by-user basis,  
11 the only data being transferred in the sense of converted  
12 includes these crash reports. So, we're going to have some  
13 class members who actually were not subject to this  
14 particular category or transfer. Well, then that's a  
15 different issue. But if it's within the -- the tag for  
16 Clearcut, there are some transfers within that tag that  
17 don't have the feature that Plaintiffs are describing as the  
18 defining feature of the conversion, meaning specifically  
19 they're time sensitive and just be done in the moment. They  
20 can't not -- they're not just historical.

21 How does that defeat class cert?

22 MR. SOMVICHIAN: Well, because the -- because the  
23 defenses to each category may be different and the -- and  
24 the mix of logs that are sent for any particular device are  
25 not the same. In fact, they're dramatically different

1 across the board. And that's just Clearcut, your Honor.

2 There's -- there are multiple levels to this.

3 PH is another one. They refer to these as -- as  
4 experiments. It actually involves a number of use cases.  
5 They can be rolling out software updates or AB tests to  
6 evaluate new features or urgent things that can't wait for  
7 WiFi, like turning off a segment of software that's causing  
8 a bug.

9 THE COURT: That's going to be flagged with a PH?

10 MR. SOMVICHIAN: That's going to be flagged with  
11 PH. There's no way to isolate that from any other use case  
12 that is associated with a PH tag. So, again, it's  
13 overinclusive. There's no way to tease out what's within  
14 their theory versus what is not.

15 THE COURT: Based on the representative sample  
16 data that you all have, has there been any way to quantify  
17 how overinclusive the let's say Clearcut category is or the  
18 PH category is?

19 MR. SOMVICHIAN: There's -- there's general  
20 testimony. There was at trial, your Honor, about just a --  
21 a general sense that the -- the turning on and off of  
22 software modules, including to address bugs is the much more  
23 common use case, but because it's not separately tagged by  
24 something more granular and they all roll up into the same  
25 one, there's no way to get more granular. There's no way to

1 parse out if -- you know, for a particular user which one  
2 they had, which kind they had.

3 THE COURT: But it would -- okay.

4 MR. SOMVICHIAN: And --

5 THE COURT: But does -- does Google dispute that  
6 in each of the four categories, at least some of the  
7 transfers within that category have the features that the  
8 Plaintiffs are alleging constitute conversion of data?

9 MR. SOMVICHIAN: Some -- within each category,  
10 there are -- there are some unknown number of transfers that  
11 could fit within the Plaintiffs' theory. But that's the  
12 point is that you can't tell which ones are in their theory  
13 and which ones are -- are not. And, so, when they calculate  
14 this average for -- for damages, it includes things that are  
15 part of their theory and parts that are not, and there's no  
16 way to do this on a more granular basis. There's no way to  
17 parse out what's at issue and what's not.

18 THE COURT: But this argument is the same whether  
19 we're talking about a class of people or an individual  
20 consumer. I don't see it as a class -- an argument against  
21 class certification. I see it as an argument that just says  
22 our dataset is not capable of that kind of granular parsing.

23 So, you'll be overstating the problem, whether we're  
24 talking about an individual user across, you know, a  
25 whatever, eight-year period that we were talking about or a



1 class of such users.

2 Is that a fair --

3 MR. SOMVICHIAN: I don't -- I don't think so, your  
4 Honor. If -- if this case were just about the named  
5 Plaintiffs, we'd be able to do a much granular assessment,  
6 including potentially examination of their device, their  
7 particular settings.

8 THE COURT: But I thought you said the data wasn't  
9 available. Like if the -- you have a flag, everything's  
10 rolled up into the flag, and you can't get any more granular  
11 than the flag. So, how could you do that for a particular  
12 user?

13 MR. SOMVICHIAN: Not on an aggregate basis, your  
14 Honor.

15 THE COURT: Well --

16 MR. SOMVICHIAN: There's no --

17 THE COURT: -- okay, but --

18 MR. SOMVICHIAN: You can't do it on --

19 THE COURT: That's why I asked about the sample.

20 So --

21 MR. SOMVICHIAN: Okay. You can't --

22 THE COURT: -- within the sample, could you do a  
23 random -- you know, random sampling of the sample and say,  
24 you know, for these whatever substantive users, we can see  
25 that the majority of the transfers are for crash reports in

1 the Clearcut logs or whatever? Like is that something that  
2 could be done? Has been done?

3 MR. SOMVICHIAN: For -- if this case were about an  
4 individual, your Honor, there'd be -- there would be more  
5 opportunity to try to get to that level of detail. That is  
6 not possible in a class-wide setting.

7 THE COURT: But why -- why should I accept this  
8 assertion that this is a big problem, class wide or  
9 otherwise, if it's not clear how big a problem it is?  
10 There's only anecdotal testimony that it happens maybe  
11 sometimes -- some unknown amount of time that it's crash  
12 reports versus not crash reports for the Clearcut logs?

13 MR. SOMVICHIAN: Well --

14 THE COURT: I just -- and, again, the way it's  
15 presented is not presented on a this is not suitable for  
16 class versus individual determination. It's just the data  
17 doesn't exist. So, Plaintiffs necessarily over count the  
18 instances of alleged conversion. That's how it's presented  
19 in the opposition, which is, you know, a good argument so  
20 far as it goes I guess on the merits and scope and all that  
21 stuff but not on a -- it doesn't strike me as a class cert  
22 argument, which is why I pushed -- pushed back on that.

23 MR. SOMVICHIAN: I understand, your Honor.

24 THE COURT: Yeah.

25 MR. SOMVICHIAN: And -- and the reason we focus on

1 the class data and the class sample and the inability to  
2 tease -- tease out what's in and what's out is because that  
3 is the only source of common evidence that they've pointed  
4 to, and that's the question. For -- for the common evidence  
5 that's been presented, does that allow us to isolate the  
6 instances that could support liability under their theory or  
7 not? And in an individual claim, I can't -- I can't tell  
8 you.

9 THE COURT: Okay.

10 MR. SOMVICHIAN: If we had somebody's device, we  
11 could definitely tell it was version A versus version B.  
12 But that's got to at least be possible in an individual  
13 trial, but we know it's impossible in a class trial given  
14 the limitations of the common evidence.

15 THE COURT: So, if they disagree with the -- with,  
16 you know, the way that you've described the evidence  
17 available -- because they -- they've insisted it's GmsCore  
18 automatic mandatory disclosure, and that's what the Clearcut  
19 logs have. That's what the PH logs have, et cetera. So,  
20 they -- they say, you know, our -- our obligation is --  
21 well, they don't say this, but the law says it's a  
22 preponderance of the evidence standard. We have to say --  
23 we can make our case based on common evidence. We're going  
24 to argue this. And you tell me you can't argue that because  
25 the -- the actual facts in the world are as follows.

1 Do I just have a dispute of fact? And I'm -- I mean,  
2 I'm not doing summary judgment right now. So, what am I  
3 supposed to do with the state of the record?

4 MR. SOMVICHIAN: It's not -- it's not a summary  
5 judgment question, your Honor.

6 THE COURT: Right.

7 MR. SOMVICHIAN: But to the extent that there's a  
8 factual dispute that goes to whether the issue is common,  
9 that is something that has to be resolved.

10 THE COURT: But don't they just -- do they prevail  
11 on that if they can show by a preponderance of the evidence  
12 that they can make the class-wide showing? Is that how I  
13 resolve that kind of issue at the class cert stage?

14 MR. SOMVICHIAN: They have -- they bear the burden  
15 now of showing that the common evidence allows them to prove  
16 up their claims in a way that teases out what's within their  
17 theory and what's not. And if the common evidence only  
18 allows them to associate a big number with one tag and we  
19 know that the tag includes thousands of logs, multiple use  
20 cases -- some are at issue, some are not --

21 THE COURT: Um-hmm. Okay.

22 MR. SOMVICHIAN: -- they haven't met their burden,  
23 your Honor.

24 THE COURT: Okay.

25 MR. SOMVICHIAN: Very quickly, just to hit some

1 points on --

2 THE COURT: Sure.

3 MR. SOMVICHIAN: -- that, I think I need to  
4 correct the record on DroidGuard. It was a surprise to me  
5 to hear that it's not at issue when Doctor Steck's damages  
6 report includes damages for DroidGuard of hundreds of  
7 millions of dollars. It's very much at issue, and it's  
8 another good example of why the tags here are overinclusive  
9 and don't allow a common source of evidence to prove up  
10 their case. This is in the declaration of Ms. Benco  
11 (phonetic) in support of our class cert opposition. I don't  
12 want to belabor it, but there -- again, multiple use cases.  
13 One happens right in the moment. DroidGuard occurs to guard  
14 against abuse. It's not done on a -- on a lag, can't wait  
15 for WiFi. It's not within their theory.

16 There's another type, another flow that --

17 THE COURT: But you're saying it's not with -- it  
18 shouldn't be within their theory but it's encompassed by  
19 their counting?

20 MR. SOMVICHIAN: Exactly.

21 THE COURT: Okay.

22 MR. SOMVICHIAN: And, again, without a way to  
23 separately parse it out.

24 THE COURT: And they -- the distinction of, Well,  
25 there's a specific flavor of DroidGuard called SafetyNet

1 that is the kind of thing that you're talking about where it  
2 has to be done in a timely way. You're not making that --  
3 is that -- is that a distinction? I mean, I want to make  
4 sure we're not talking about apples and oranges and I  
5 understand you correctly. Any DroidGuard, anything time  
6 sensitive must be done urgently, can't wait?

7 MR. SOMVICHIAN: They -- they -- they have not  
8 carved out the portion of DroidGuard that happens in the  
9 moment, cannot wait for WiFi, and is not within their theory  
10 as it's described in Ms. Benco's declaration.

11 THE COURT: Okay. But I'm trying to understand  
12 your argument. Is there a portion of DroidGuard that can  
13 wait and a portion of DroidGuard that can't wait?

14 MR. SOMVICHIAN: Correct.

15 THE COURT: Okay.

16 MR. SOMVICHIAN: There's -- there's the -- right.

17 THE COURT: And does Google's data allow that  
18 carving out to happen?

19 MR. SOMVICHIAN: No.

20 THE COURT: Okay. So, it's like just can't be  
21 shown?

22 MR. SOMVICHIAN: Again, if there -- there may be  
23 some individual evidence based on somebody's device or  
24 something that hasn't been developed yet, but we know from  
25 the common sources of proof that distinction can't be made.

1 THE COURT: Okay.

2 MR. SOMVICHIAN: So, that's another example. So,  
3 these -- these issues cut across the board, your Honor. So,  
4 the -- the case is immensely complex, and the -- the -- the  
5 methodology that's been presented doesn't meet their burden  
6 of proof with respect to just identifying what's at issue.

7 Let me -- let me address consent next.

8 THE COURT: Okay.

9 MR. SOMVICHIAN: There's -- there's debate in the  
10 briefs, and there's been discussion today about whether it's  
11 an objective or subjective standard. They point to the  
12 Calhoon case, which was this -- which was a case resolved on  
13 summary judgment.

14 You know, we don't -- we don't dispute that an  
15 objective standard could apply in the context of express  
16 consent based on like contractual terms of service or some  
17 other binding source of information. But that -- that's not  
18 -- that's not what supports our class certification  
19 opposition. We -- we acknowledge there are terms of  
20 service. There are contractual sources that we'll have to  
21 litigate in this case, as we did in the Chupo case. And --  
22 and the interpretation of those will -- will follow normal  
23 rules of contract interpretation. Typically --

24 THE COURT: Express consent you mean?

25 MR. SOMVICHIAN: Yes, express consent based on an

1 objective standard for contractual sources.

2 THE COURT: Okay.

3 MR. SOMVICHIAN: But the point that you can't --  
4 but the point for why the consent issue here is  
5 individualized is because it goes beyond express contractual  
6 consent, and there are a number of additional sources of  
7 information that users don't have to go to, they're not  
8 contractually bound to, but they, nonetheless, could be  
9 exposed to review and understand exactly what's going on  
10 here.

11 And -- and the -- the --

12 THE COURT: What would those be?

13 MR. SOMVICHIAN: So, let -- let me give you some  
14 examples. So, I think -- I want to address kind of a  
15 hypothetical that you posed, your Honor --

16 THE COURT: Okay.

17 MR. SOMVICHIAN: -- about, Well, why don't --  
18 can't -- isn't -- isn't the way this case -- you know, isn't  
19 the way this all plays out that we'll look at disclosure X  
20 and we'll -- we'll make a determination if -- if that's  
21 sufficient or not, perhaps on summary judgment. And then  
22 we'll look at the next one and on -- you know, from their  
23 perspective, they'll say it doesn't matter what people's  
24 subjective understandings were. We're going to look at this  
25 objectively, and we'll look at things piece by piece.



1       You know, that -- that's not how the consent analysis  
2 works because in the real world, people become aware of  
3 things. People become -- people understand how their  
4 devices work and make decisions on whether they want to  
5 continue using android device from a mix of information.

6       So, take -- take, for example, Exhibit 25 to my  
7 declaration in the -- to the opposition. That's a good  
8 example, your Honor, of a disclosure that specifically  
9 addresses GmsCore. Counsel noted that that's the software  
10 that implements everything that we're talking about. The  
11 outside name is Google Play Services. This page directly  
12 addresses Google Play Services, talks about all the various  
13 subcomponents of the different kinds of network transfers  
14 enabled by Google Play Services and explains that they occur  
15 in the background. That's what the Plaintiffs are  
16 complaining about, and that's disclosed. And I think their  
17 theory would be, well, it still doesn't say -- even though  
18 it says in the background and that's our -- that's our  
19 central complaint, it still doesn't say that it's in the  
20 background, plus it can consume your cellular data.

21       Now, we would say, depending on people's circumstances,  
22 if they -- if they very rarely connect to WiFi and they have  
23 a cell phone that they connect to a cell network, they will  
24 understand that when this disclosure says your device sends  
25 this stuff back to Google, they'll understand that it means

1 and includes cellular data. That's pretty intuitive.

2 But even if we think that that somehow still falls  
3 short looking at that standing alone, there are other  
4 disclosures. There are carrier terms that make very clear  
5 your device is preloaded with software that can use your  
6 cellular data in the background even when you're not doing  
7 something. So, people who see a different mix of  
8 information may have a different understanding, and that's  
9 true whether --

10 THE COURT: So -- okay.

11 MR. SOMVICHIAN: -- you think of that as a  
12 subjective or objective standard, your Honor. If it's an  
13 objective standard, it still depends on the -- the mix of  
14 information that people have seen. So, that --

15 THE COURT: I don't think it's subjective or  
16 objective, though. I mean, if I understand you correctly,  
17 implied consent is you imply consent from the circumstances.  
18 And, so, I'm not entirely sure I'm -- I'm comfortable with  
19 the way that you're using the word "subjective" here because  
20 implied consent could be an objective standard. Like, would  
21 you imply consent from this behavior or are you suggesting  
22 that the only way consent can be litigated in this case is  
23 you have to ask each individual user, Did you understand  
24 that this would happen, and did you understand that Google  
25 would be using your cellular data -- part of your cellular

1 data plan to do this transfer?

2       Like, if that's the kind of proof you think is  
3 necessary, okay. But it didn't seem to me like that was  
4 really the argument. The -- the argument is you can imply  
5 that some subset of these people would have this  
6 understanding and be okay with it because the evidence is  
7 they keep using their phone, even after this disclosure.  
8 So, therefore, we imply their consent.

9           MR. SOMVICHIAN: Correct.

10          THE COURT: Okay. So, it's -- it doesn't really  
11 depend on what a particular user thought or not thought  
12 about a particular disclosure. It depends on whether this  
13 is the kind of thing from which you can imply consent?

14          MR. SOMVICHIAN: That's -- that's -- that's --

15          THE COURT: That seems to me like kind of  
16 different.

17          MR. SOMVICHIAN: I think that's right, your Honor,  
18 but -- but -- but that's different than looking at  
19 individual disclosures in isolation and making judgments  
20 about whether they're adequate or not adequate on a class-  
21 wide basis.

22          The point is there are multiple pieces of information,  
23 and the under -- even if these talk about it as objective,  
24 the objective understanding that someone might have based on  
25 looking at the two pieces of information that I described

1 might be different from the objective or subjective  
2 understanding that someone might have based on different  
3 pieces of information. We see that in the survey evidence  
4 which shows that there are majorities -- substantial  
5 majorities of people who understand that their android  
6 device will send information in the background when they're  
7 not doing anything with the device actively, and that that  
8 can occur over cellular -- people understand that. And  
9 then --

10 THE COURT: Okay.

11 MR. SOMVICHIAN: -- understanding that from --

12 THE COURT: Your survey evidence isn't challenged  
13 I don't think in this --

14 MR. SOMVICHIAN: It is -- it was not, your Honor.

15 THE COURT: -- Daubert I think. So, does -- but  
16 does -- I was curious about it because does the survey take  
17 the additional step and say, And do you understand that this  
18 will come out of your -- be charged against -- be part of  
19 the data that you've already contracted with your carrier to  
20 -- to -- so, like, does it have the additional question of  
21 like, Yes, you understand this happens over the cellular  
22 data network, but do you understand that that's on your  
23 plan?

24 MR. SOMVICHIAN: That wasn't an -- an additional  
25 question, your Honor.

1 THE COURT: Okay.

2 MR. SOMVICHIAN: Not in the survey.

3 THE COURT: I just was curious --

4 MR. SOMVICHIAN: Yeah.

5 THE COURT: -- because it wasn't before me. All  
6 right.

7 MR. SOMVICHIAN: But, so, again, on consent, we do  
8 think that that defeats class certification. That's  
9 consistent with numerous cases that have similar record.

10 THE COURT: And what's your best case for that?

11 MR. SOMVICHIAN: There are a number, your Honor.  
12 So, the In Re Gmail case from Judge Koh from 2014, the  
13 series of cases from Judge Gonzalez Rogers, the RTB case,  
14 Brown case.

15 THE COURT: Brown and RTB, okay.

16 MR. SOMVICHIAN: All of those involve a similar  
17 mix of information, Google disclosures, Google terms, third  
18 party disclosures, survey evidence, all very similar mix of  
19 information, and I think our record here is very similar to  
20 what was deemed sufficient in those cases to support a  
21 finding that individualized issues of implied consent defeat  
22 class certification.

23 THE COURT: Okay. Thank you.

24 MR. SOMVICHIAN: Okay. Let me -- let me turn now  
25 to some of the damages issues.

1 THE COURT: Okay.

2 MR. SOMVICHIAN: And let -- let me -- let's start,  
3 your Honor, with -- with the Ninth Circuit decision.

4 THE COURT: Okay.

5 MR. SOMVICHIAN: And you -- you posed the question  
6 as what -- what do the Plaintiffs still have to show in  
7 terms of some impact? What is the thing that's being  
8 measured here? And you pointed to one aspect of the  
9 memorandum decision on page five referring to Plaintiffs'  
10 "experiencing an immediate discrete loss of a specific sum  
11 of valuable cellular data which is charged against their  
12 data plans." That -- that is very relevant.

13 I also want to point out a part on page four.

14 THE COURT: Page four?

15 MR. SOMVICHIAN: Right in the middle of the page.

16 THE COURT: Okay. I'm looking at the Westlaw  
17 numbers. Sorry.

18 MR. SOMVICHIAN: Okay. I'm -- I'm sorry. I don't  
19 have the Westlaw version.

20 THE COURT: Okay. Go ahead. Just tell me where  
21 it is. I'll find it.

22 MR. SOMVICHIAN: Yeah. It's in the -- it's in the  
23 paragraph that starts "Plaintiffs adequately plead the  
24 second element" --

25 THE COURT: Second element. Yeah, okay. Got it.

1 MR. SOMVICHIAN: And about halfway through that  
2 paragraph, the Court says:

3 "Therefore, Google's unauthorized  
4 transfer of bytes using Plaintiffs' data  
5 allotment necessarily prevents  
6 Plaintiffs from using all the data they  
7 purchase from their carrier."

8 So, the question is, given the Plaintiff's particular  
9 plan terms and what they alleged in the complaint, did the  
10 -- did Google's unauthorized transfer prevent them from  
11 using all the data they purchased from their carrier.

12 THE COURT: Yes.

13 MR. SOMVICHIAN: And -- and --

14 THE COURT: The Ninth Circuit has said yes.

15 MR. SOMVICHIAN: And in a context where the  
16 complaint included plaintiffs with limited plans, one  
17 plaintiff with a pay-as-you-go plan that was based on paying  
18 for a gigabyte at a time, in the context where the  
19 Plaintiffs on appeal emphasized those types of plans and  
20 emphasize their theory that actual throttling, actual  
21 overages are not required -- they made that point very clear  
22 in their arguments. Their theory was that the potential for  
23 throttling and overages is really the harm because it causes  
24 people to ration their use.

25 THE COURT: I don't think anything in this

1 decision has anything to do with what -- what is the  
2 consequence of the Plaintiffs' behavior in light of these  
3 data transfers. It's -- it's straight up data is like  
4 water. You used my water. You owe me. That is kind of the  
5 -- that's the reading -- the only fair reading I think I can  
6 give to this decision. And, as you know, I disagreed with  
7 that, but I think we're past that. I think it is stuff  
8 that's capable of conversion, so says the Ninth Circuit.

9 MR. SOMVICHIAN: We're -- I'm -- I'm not disputing  
10 the property --

11 THE COURT: Yeah.

12 MR. SOMVICHIAN: -- component of it. I think we  
13 are past that. But I don't think -- I don't think that the  
14 Ninth Circuit's decision can fairly be read as simply  
15 assuming that the -- the use of data constitutes the  
16 interference and harm elements that are needed to save  
17 conversion for every type of data plan across the class  
18 period, regardless of what the throttling caps might be,  
19 regardless of what any specific term might be. That was not  
20 the question presented to the Court. Procedurally, there  
21 was no need -- reason for the Court to -- to issue a ruling  
22 based on any rationale broader than what it had in front of  
23 it, which was the complaint and a complaint that involved  
24 allegations of limited plans, pay-as-you-go plans and in a  
25 context where those elements were very much emphasized and



1 stressed. So, when the -- when the Court says that there --  
2 there is the necessary impact for the second element of  
3 conversion where a use prevents Plaintiffs from using all  
4 the data they purchased from their carrier, we have to  
5 determine whether a particular plan fits within that  
6 contemplated impact.

7 THE COURT: I -- I'm not sure I agree with that.  
8 So, I -- I mean, I don't know what to tell you, but I don't  
9 read the Ninth Circuit decision as sort of holding back on  
10 the question of this could be dependent on whether it's an  
11 unlimited plan where you would never run out of data or  
12 would even count, versus a situation where there are limits  
13 and you only have X, because the way it's framed is the user  
14 has possession of the data, however much it is, and Google  
15 takes that data without the user's permission allegedly, and  
16 that is sufficient for conversion for the first two  
17 elements. And then the question of harm is just what -- by  
18 virtue of having your data taken that you possess, you have  
19 been harmed. It's just kind of --

20 MR. SOMVICHIAN: Your --

21 THE COURT: I mean, it's very counterintuitive in  
22 some ways, I grant you. But that's how I read the Ninth  
23 Circuit. I just don't --

24 MR. SOMVICHIAN: I --

25 THE COURT: You're not -- this is probably not a

1 good use of your time because --

2 MR. SOMVICHIAN: I hear you.

3 THE COURT: -- I don't think I could make a  
4 finding at this stage that somehow we have to look at every  
5 single plan and figure -- and parse it out for the 100  
6 million class members in light of the nature of the injury,  
7 the nature of the data conversion that's alleged. I just --  
8 I don't think I will find in your favor on that point.

9 MR. SOMVICHIAN: I -- I --

10 THE COURT: I -- valiant effort.

11 MR. SOMVICHIAN: -- assure you, your Honor, and  
12 let me just leave you with this on the -- the impact that's  
13 needed.

14 THE COURT: Okay.

15 MR. SOMVICHIAN: In addition to the Ninth  
16 Circuit's memorandum decision, we also have to account for  
17 California law.

18 THE COURT: Okay.

19 MR. SOMVICHIAN: There's the Intel v. Hamidi case.

20 THE COURT: They were purporting to apply  
21 California law, but okay. I get you.

22 MR. SOMVICHIAN: Yes.

23 THE COURT: Intel v. Hamidi.

24 MR. SOMVICHIAN: California Supreme Court  
25 decision, your Honor, which we think is highly relevant if

1 not dispositive here because it involved -- it involved a  
2 situation -- it involved a trespass claim, lower standard,  
3 lesser showing needed of interference and impact to the  
4 property and harm to the individual. And even in that  
5 instance where the showing was, in our view, greater than  
6 what's shown here, the California Supreme Court said that  
7 that's not enough, and the specific facts involved a  
8 company, Intel, getting spammed by tens of thousands of  
9 emails, and that, the Court observed, caused a portion of  
10 their systems, their storage, memory, processing ability on  
11 their computing system, to be consumed as a result of this  
12 email spamming.

13       The Court said that that's not enough. Even though  
14 that that was a measurable impact, even though it was an  
15 actual impact, it said there has to be some measurable harm  
16 that flows from the use. It viewed the -- the use of the  
17 system to be just that, use, but held that there has to be,  
18 beyond that, some showing of a measurable loss to the  
19 Defendant -- to the Plaintiff. I'm sorry.

20       We don't have that here, your Honor. You could  
21 theoretically have it under some individualized facts, but  
22 certainly we don't have that here on a class-wide basis  
23 based on the mere use of a portion of somebody's data plan,  
24 particularly for people who are on unlimited plans, and  
25 there are now variations, as counsel noted, of unlimited

1 plans where there really isn't even throttling. And --

2 THE COURT: But this didn't have to do so much  
3 with the -- the use of resources as with the interference  
4 with the computer's functioning. That's how the dispute was  
5 framed. This dispute is framed differently. So, I'm not  
6 sure that these things match. And even putting aside, you  
7 know, that's a trespass case, this is a conversion case -- I  
8 understand, you know, their argument that the showing needed  
9 for trespass is lesser typically than for conversion, it  
10 still seems to me like the thing that the California Supreme  
11 Court was talking about in Intel v. Hamidi was really  
12 focused on the computer itself and not sort of the -- these  
13 sort of increments of property which the -- the Plaintiffs  
14 are describing here as the -- you know, the data is the  
15 increments of property that were -- that were taken. I  
16 mean, nobody argued that the computer was taken.

17 MR. SOMVICHIAN: But -- but increments of storage,  
18 increments of processing power were --

19 THE COURT: But the Court was looking at the  
20 computer as a whole. If what they were -- if the case was  
21 litigated on the basis of the storage is property, you're  
22 taking my storage -- and I'm not sure that it was. At least  
23 the Supreme Court didn't frame it that way -- you know,  
24 maybe that would be a closer -- closer mesh. Unfortunately,  
25 I think I'm just still bound by what the Ninth Circuit has

1 said. And maybe the Ninth Circuit got it wrong and you will  
2 have an opportunity to tell them that some day or the  
3 California Supreme Court will take a look at your Chupo case  
4 and tell us all what the right answer is. But right now I  
5 think I would find it very difficult to say that somehow  
6 this theory cannot be a basis for class certification at  
7 this time.

8 MR. SOMVICHIAN: Okay.

9 THE COURT: But --

10 MR. SOMVICHIAN: Understood, your Honor.

11 THE COURT: -- I would like to hear about damages,  
12 though --

13 MR. SOMVICHIAN: Yes.

14 THE COURT: -- very much.

15 MR. SOMVICHIAN: Very last point on -- I promise  
16 this is the --

17 THE COURT: That's okay.

18 MR. SOMVICHIAN: -- the 45 seconds on --

19 THE COURT: Okay.

20 MR. SOMVICHIAN: -- the Ninth Circuit's opinion.  
21 In -- in the portion that you quoted, your Honor, about  
22 direct loss of a specific sum of valuable cellular data and  
23 the forced sale concept --

24 THE COURT: Yeah.

25 MR. SOMVICHIAN: -- that comes from this Tyrone

1 Pacific International case, also a Ninth Circuit decision.  
2 That case is very interesting because in that case, the --  
3 the Court affirmed a lower court's finding that there was  
4 no damages available, neither the fair market value or a  
5 consequential damages measure. Why? Because it looked to  
6 the actual facts and whether there was actual loss or impact  
7 from -- from that fact pattern.

8 So, it's very interesting that the Ninth Circuit in  
9 this decision cites back to that case. That's the only --

10 THE COURT: Yeah. I mean, I don't know what to  
11 make of it. I could imagine there is a scenario where the  
12 fair market value of data like this is like negligible, like  
13 really negligible, and all the evidence you all are bringing  
14 to bear, both in the world and in terms of the economic harm  
15 that in -- you know, a typical user might have suffered,  
16 like is there actual economic damage. Those are relevant to  
17 the valuation, but in the end, you don't get to the  
18 consequential economic harm. And this is what I understand  
19 is your opposition to the Daubert motion is that our expert  
20 is like talking about these economic principles in rebuttal  
21 to the fair market value theory being advocated by the  
22 Plaintiffs' expert. That's all fine. I think that's all  
23 fine. They haven't really argued that in detail, but I  
24 think that's all fine. But it is the case that the -- the  
25 California law sets forth the framework for the damages

1 model, and we are valuing the property that was taken and  
2 not other things, except for this alternative, you know,  
3 potential, I guess in cases where it's unfair, that model  
4 results in something unfair either way.

5       Okay. So, sorry. I don't want to cut short your  
6 opportunity to argue damages.

7               MR. SOMVICHIAN: Yeah. So, let's -- let's turn to  
8 damages. And let's take it in -- in portions.

9               THE COURT: Okay.

10              MR. SOMVICHIAN: There's the equation that the  
11 Plaintiffs are using -- with respect, uses to come up with  
12 big damages numbers in this case. First it's the -- the  
13 total amount of cellular data consumed, and you asked some  
14 questions about how -- whether and how that could be  
15 allocated to individuals or the set person, and the second  
16 part is what's -- what's the dollar value you associate with  
17 that amount of cellular data.

18              But on -- on the first point, your Honor, you -- you  
19 asked the question to counsel how do you allocate this to --  
20 to individuals, and there's an aggregate number that's  
21 generated. We don't think that that's reliable for a number  
22 of reasons we pointed out in our Daubert motion. But,  
23 separate and apart on -- on top of all those flaws, you put  
24 your finger on a fundamental problem here, which is there is  
25 no way to allocate this big pot of damages that they've

1 identified and say, Okay. User X, you had this amount --  
2 this -- this number of megabytes that fall within these  
3 buckets or within these tags, and, therefore, we'll multiply  
4 your cellular usage by this dollar value, and then that will  
5 be your damages.

6       There's no way to identify that specific amount because  
7 all they've -- all they've come up with is an aggregate  
8 number, and then they divide that by the total estimated  
9 number of devices to come up with an average.

10           THE COURT: Doesn't Google have that information?

11           MR. SOMVICHIAN: We don't, your Honor, not for  
12 individual users. Part of the problem is much of the data  
13 is not associated with any given device or user. It's --

14           THE COURT: Well, you have the sample. Where did  
15 the sample come from?

16           MR. SOMVICHIAN: The sample comes from two -- two  
17 sets of data. There is -- a portion of the data is  
18 associated with a Google identifier or an android  
19 identifier, and another portion of the data, because users  
20 toggle versus settings, another part of the data is not  
21 associated and cannot be associated with an individual user,  
22 and it's instead associated with a pseudonymous identifier  
23 that by design --

24           THE COURT: Okay.

25           MR. SOMVICHIAN: -- can't be linked up.



1 THE COURT: So, how do we know there are 100  
2 million class members?

3 MR. SOMVICHIAN: That -- that's the Plaintiffs'  
4 estimate based on aggregate statistics of android users.

5 THE COURT: Okay. So, like we would -- in an  
6 employment case and/or a wage and hour case, we would be  
7 calculating damages based on the number of work weeks versus  
8 how much overtime you didn't get, like that kind of thing.  
9 You're telling me we can't ever do that here, that it will  
10 be some average based on the 10,000 --

11 MR. SOMVICHIAN: You could --

12 THE COURT: -- applied like times 100 million  
13 users? Like that's -- that's what you're telling me is the  
14 way this would work?

15 MR. SOMVICHIAN: You could -- you could come up  
16 with an average, but for any given individual, particularly  
17 those where they're not associated with any identifier in  
18 the data, there's no way to know if that person had half of  
19 the average, a tenth of the average, more than the average,  
20 because there's no way to identify a specific user in the  
21 dataset because of this use of pseudonymous identifiers for  
22 the --

23 THE COURT: So, how do you even know who the class  
24 members -- let's say like Plaintiffs are successful, they  
25 get a result, there's a class certified, you have to give

1 notice to the class, number one, and then you have to  
2 distribute the proceeds to the class. How do we even do  
3 that, and does everybody get the same amount or some people  
4 are overpaid, other people are underpaid? Like is that --  
5 is that what you're telling me is going to happen?

6 MR. SOMVICHIAN: Yes, your Honor.

7 THE COURT: Okay.

8 MR. SOMVICHIAN: You'll have a big lump sum  
9 without a meaningful way to distribute it other than, you  
10 know, a -- a random method that -- that would dramatically  
11 overpay some people because what we -- what we know from the  
12 data is that it -- it's not within like a small band. You  
13 know, it's not like, okay, it's like plus or minus 10, 15,  
14 20 percent. There are -- there are devices in the dataset  
15 where the total amount of cellular data associated with the  
16 bag tags is, you know, one -- a very small fraction, one  
17 over 70 or --

18 THE COURT: When you say the dataset, are you  
19 talking about this representative sample or are you talking  
20 about the bigger dataset from which the representative  
21 sample is pulled?

22 MR. SOMVICHIAN: I'm talking about the  
23 representative sample that was used for class cert purposes.  
24 We know in that data that the range is massive.

25 THE COURT: Okay.

1 MR. SOMVICHIAN: And, so, if you gave everybody  
2 the average, that would dramatically overpay certain users,  
3 and we know that that's improper, your Honor, from all of  
4 the case law. A lot of it is in the employment context  
5 where the Supreme Court has weighed in about the use of what  
6 is called, you know, a trial by formula. This is the  
7 Walmart case, for example.

8 In that case, there was a trial method in which the --  
9 the average back pay award for a sample set of plaintiffs  
10 was determined, and then the average of that amount was  
11 extrapolated to the class as a whole, and the Court said  
12 can't do that. That's a trial by formula. That deprives  
13 the Defendant of being able to assert individualized  
14 defenses.

15 That's exactly what this methodology is, your Honor,  
16 that we're talking about here. It's taking an average,  
17 applying it across the board in a way that deprives Google  
18 of the ability to defend against that by saying, Well, this  
19 -- this person, because of their android device  
20 configuration and their settings and their operating system  
21 version, they would have sent a tenth of that.

22 THE COURT: But if Google can't say that because  
23 it doesn't have the data, then where does that leave us?

24 MR. SOMVICHIAN: Class certification should be  
25 denied, your Honor, because --

1 THE COURT: Okay. But -- but -- okay. Class  
2 certification can't work, but then you say this deprives  
3 Google of its ability to make this kind of individualized  
4 defense. But if you can't make that individualized defense  
5 anyway because the data no longer exists, then where does  
6 that leave us?

7 MR. SOMVICHIAN: We can cross examine an  
8 individual plaintiff. We can talk to them about -- we can  
9 examine their device. We can ask them how they used it. We  
10 can ask them what settings they had. We can ask them what  
11 operating system they had. We can have our expert analyze  
12 that and say measured against an average, you would be a  
13 small fraction of that or we'd be able to do any other --  
14 any number of other methods in an individualized trial that  
15 we simply are deprived of the opportunity to do in the class  
16 setting and based on the formula that they're -- that  
17 they're intending to apply here, your Honor. That's the  
18 fundamental problem.

19 THE COURT: Okay. I've noted that issue.

20 MR. SOMVICHIAN: And -- and on top of the Walmart  
21 case, two -- two other cases that I think are -- are very  
22 important here in evaluating whether this average method can  
23 be extrapolated to the class as a whole. Counsel said that  
24 it's -- it's commonplace and -- and accepted. It's not.  
25 In the Jimenez v. All State Insurance case -- that's

1 Ninth Circuit, 765 F.3d 1161. This is the Ninth Circuit  
2 applying Dukes and Comcast, and it says:

3 "Circuit courts, including this  
4 one, have consistently held that  
5 statistical sampling and a  
6 representative testimony are acceptable  
7 ways to determine liability so long as  
8 the use of these techniques is not  
9 expanded into the realm of damages."

10 So, statistical sampling or representative evidence,  
11 that's the same as this average methodology that we're  
12 talking about here, your Honor. And in the context of these  
13 employment cases, it's been accepted if you do the -- if you  
14 do the sample right and you get the methodology correct, you  
15 can do that for liability.

16 But what the Ninth Circuit is saying, you still can't  
17 extend that to damages. And in -- in -- in the employment  
18 context, it actually is feasible given the numbers once a  
19 liability finding has been made to have individualized  
20 findings on damages. That's not possible here, and the  
21 Ninth Circuit said you can't apply this statistical or  
22 representative or average approach to damages.

23 THE COURT: But it would still work for purpose of  
24 the injunctive class.

25 MR. SOMVICHIAN: In what way, your Honor?

1 THE COURT: I mean, you could -- we wouldn't have  
2 to worry about these things from a class certification point  
3 of view if all we were talking about is certifying an  
4 injunctive class, because whether it was, you know, a little  
5 bit or a lot of data usage across the class population, it  
6 could still be amenable of class-wide treatment -- class-  
7 wide remedy of an injunctive nature on a going forward  
8 basis, correct?

9 MR. SOMVICHIAN: Uh --

10 THE COURT: I mean, this is really damages  
11 specific argument.

12 MR. SOMVICHIAN: I -- I think so, your Honor. So,  
13 that specific issue alone might not relate to the (b)(2)  
14 issue, but there are lots of other problems with the (b)(2)  
15 class in terms of just the -- the 23(a) commonality  
16 threshold being met, but --

17 THE COURT: Okay.

18 MR. SOMVICHIAN: -- set aside (b)(2) for --

19 THE COURT: Yeah.

20 MR. SOMVICHIAN: -- for a moment.

21 THE COURT: Okay.

22 MR. SOMVICHIAN: The -- the last case I want to  
23 make sure you have in mind, your Honor, because it bears  
24 directly on this idea that you can just -- you can just take  
25 an average. We have 100 million users. They're on

1 thousands of different plans. Their data usage, one person  
2 is 70X of another. Just take an average and -- and apply it  
3 across the board. That doesn't work.

4 Another case that says it doesn't work is the Supreme  
5 Court case Tyson Foods.

6 THE COURT: Um-hmm. Okay.

7 MR. SOMVICHIAN: I think you're well familiar with  
8 that -- with that case, your Honor. But in that case, again  
9 -- and in an employment context, so, much more  
10 straightforward, but even in that context, the Court was  
11 very careful to caution that if you're taking an average  
12 calculation or some statistical methodology, first of all,  
13 it's really only applicable to liability, and under the  
14 Ninth Circuit standard, it shouldn't be applied to damages.  
15 But -- but setting that -- even setting that aside, the  
16 question is could that average method have been submitted by  
17 an individual plaintiff if they were pursuing an individual  
18 claim. And in that case, it was appropriate. It had to do  
19 with, you know, the amount of time that certain employees  
20 who all work at the same plant, they all have the same  
21 equipment. On average, it took them X minutes to put their  
22 -- take their equipment on and off.

23 THE COURT: Yes. Got it.

24 MR. SOMVICHIAN: And the Court said even in an --  
25 even if the case were only about that one individual

1 Plaintiff, that evidence would be appropriate.

2       Our circumstances are much different, your Honor. So,  
3 if the case were only about a single plaintiff and -- and we  
4 were actually able to determine their -- their amount of  
5 data usage and they were on, you know, this end of the  
6 spectrum, one -- 1/70th of -- of the average and maybe even  
7 a smaller fraction of people on the high end, why on earth  
8 would they be allowed to present evidence that, Well, I had,  
9 you know, X number of megabytes, but I want to be  
10 compensated for taking -- you know, Google taking my  
11 property. I want you to assume that they took 70X because  
12 somehow that's the average.

13       That would never be admissible in an individual trial,  
14 and that's -- in the Tyson case, I think there's a really  
15 important lens from which to think about all of the elements  
16 of the -- of the damages equation with respect to not just  
17 the amount of cellular data but also the dollar value that  
18 we're associating with it.

19       Let me -- let me turn to that next.

20               THE COURT: Okay.

21               MR. SOMVICHIAN: We talked a lot about the average  
22 price calculation. I don't want it to get lost that there  
23 are other calculations here, and it's really important that  
24 we -- we think about those individually because -- I'll talk  
25 about the average price next, but there's also this Google



1 Fi --

2 THE COURT: Yeah.

3 MR. SOMVICHIAN: -- theory.

4 THE COURT: It's -- yeah.

5 MR. SOMVICHIAN: Which increases damages by 34X.

6 THE COURT: I -- and I understand. I think the  
7 argument is pretty discrete on that one about how that  
8 number is being used in a way that Google thinks is not  
9 appropriate to come up with a per gigabyte number. I get  
10 that. So, you can talk about it if you want to, but I think  
11 I -- I understand that is a discrete argument from the  
12 average.

13 MR. SOMVICHIAN: Okay.

14 THE COURT: Yeah.

15 MR. SOMVICHIAN: And sounds like you get it on  
16 Google Fi, your Honor, but I do want to point out it's --  
17 it's a billion dollar issue.

18 THE COURT: Yeah. It's a huge number.

19 MR. SOMVICHIAN: Whether -- whether Google Fi is  
20 in the case or not.

21 THE COURT: Right.

22 MR. SOMVICHIAN: And we think for that one we  
23 spent a lot of time talking about average price, but for  
24 Google Fi, it's -- it's not even a close call if you look at  
25 the -- the Plaintiffs' expert reports.

1 THE COURT: Is Google Fi part of the average or  
2 it's left out of the average? I think someone mentioned  
3 that in the papers, but I can't remember what the answer  
4 was.

5 MR. SUMMERS: It would be -- it would be part of  
6 the average.

7 THE COURT: It's part of the average. Okay. So,  
8 if Google Fi were out of the case in some way, would it be  
9 out of the average calculation? Is that what Google's  
10 advocating? And, so, that average number would be  
11 different?

12 MR. SOMVICHIAN: I -- I think all of the damages  
13 models should be --

14 THE COURT: I -- I know, but --

15 MR. SOMVICHIAN: -- stricken, your Honor, but --

16 THE COURT: -- I'm talking about this particular  
17 dimension. I don't understand your argument. If I say  
18 Google Fi is not a reliable measure of the fair market value  
19 of data, does that mean it has to come out of the expert's  
20 average calculation as well as its own stand-alone  
21 calculation?

22 MR. SOMVICHIAN: I think -- I think the average  
23 price calculation fails for separate independent reasons.

24 THE COURT: I understand.

25 MR. SOMVICHIAN: Yeah.

1 THE COURT: Okay. Go ahead. I'll let you proceed  
2 with your argument.

3 MR. SOMVICHIAN: On -- on the average price  
4 question, your Honor, you -- you asked what -- what is --  
5 what is the thing we're trying to put a value on. So, I  
6 think -- and then, relatedly, what -- what is the -- what is  
7 the hypothetical market that we should be thinking about,  
8 who's the -- who's the buyer and who's the --

9 THE COURT: Who's the buyer and who's --

10 MR. SOMVICHIAN: -- seller.

11 THE COURT: -- the seller.

12 MR. SOMVICHIAN: So, first of all, the -- the it,  
13 the -- the thing that we're trying to value, there's some --  
14 there's been some discussion of it being a commodity. The  
15 -- the theory does depend on cellular data services being a  
16 commodity. The ability to take one price, whether it's  
17 Google Fi or this average, and apply it across the board to  
18 literally thousands of plans over the -- over the course of  
19 the class period and to say that that is a reliable measure  
20 of class-wide damages necessarily depends on being able to  
21 show from an economic scientific perspective that cellular  
22 data services are a commodity. It's the same thing under  
23 every single data plan. They haven't presented a shred of  
24 expert or economic or any other support for that notion,  
25 your Honor. It's one passing reference in one paragraph in

1 the Etner report that even uses the term "commodity", and  
2 you can read every single expert report from every  
3 Plaintiff's expert. You will find no explanation about why  
4 that should be accepted. There is no comparison of how  
5 Google Fi or -- or the average price compares to cellular  
6 data services overall. There's no showing that network  
7 coverage, network speeds, network reliability, all the  
8 things that carriers compete directly against each other on,  
9 all of those metrics, there's no showing that those things  
10 are the same across the board in a way that would allow you  
11 to think of cellular data service as a commodity. And, in  
12 fact, all of the evidence points the other way, where the  
13 prices span, again, an immense range for -- for a given  
14 year. This is in the Gos report. Exhibits to the Gos  
15 report show the price variation across data plans in a given  
16 year 10X, 20X. You know, layer on top of that, the bundled  
17 services that are included. You pointed to some of these,  
18 your Honor.

19 And, so, when people buy plan X versus plan Y,  
20 something from T Mobile versus Sprint or any other carrier,  
21 these are not fungible commodities. They're different plans  
22 on different networks with different metrics as it -- as  
23 they relate to reliability, speed, throttling terms,  
24 everything else. And there's nothing, nothing in any of the  
25 Plaintiffs' expert reports that supports any kind of

1 contrary finding. So, it's not a battle of the experts.

2 It's not --

3 THE COURT: Yes.

4 MR. SOMVICHIAN: -- you know --

5 THE COURT: But the Plaintiffs say, Our expert has  
6 accounted for these kinds of things, has tried to apportion  
7 and disaggregate the bundling of services that aren't part  
8 of the valuation. And we've accounted for this variation.  
9 Can't be perfect, but, you know, we've accounted for it.  
10 And, so, you know, your expert can put up a different much  
11 smaller number based on your own analysis. And this  
12 happens. In every damages case I've ever seen there are  
13 vastly different views of what the damages are and the value  
14 of whatever it is we're trying to value. So, why is that a  
15 basis for defeating class certification or for excluding the  
16 expert if the experts just disagree?

17 MR. SOMVICHIAN: So, your Honor, it's -- it's not  
18 just that -- it's not just a disagreement where there's a  
19 record on one side. Cellular data service is a commodity,  
20 and here are the economic reasons why and then contrary  
21 opinions on the other. There -- there isn't a showing in  
22 the first instance, certainly not one that can meet the  
23 Daubert standards, that this average calculation even passes  
24 that initial threshold.

25 THE COURT: What about this idea that this -- the

1 Plaintiffs' expert calculates this kind of thing on a yearly  
2 or biyearly basis --

3 MR. SOMVICHIAN: Yes.

4 THE COURT: -- for the industry? And that's a  
5 just normal ordinary industry relies on it there for a data  
6 point in the world and it should just be used.

7 MR. SOMVICHIAN: He does do that for a much  
8 different purpose. So, it's actually not even an average  
9 price, and I think you -- I think you pointed this out. The  
10 -- the calculation is the total amount that's spent, not for  
11 what consumers buy, not for the cellular data allowances  
12 that they get. That might be a way of deriving an average  
13 price for cellular data for consumers, but it's based on a  
14 calculation where the denominator is the amount of usage.  
15 And that makes sense for this industry purpose that Doctor  
16 Etner calculates this for. It says perfectly to  
17 calculate a consumer's surplus for industry use. But it's  
18 not even a calculation of what consumers pay in terms of an  
19 average price of -- in relation to -- to what they -- they  
20 get. And then the -- the other disconnect is what you  
21 pointed out, which is what's the market that we're talking  
22 about here. That -- because we're -- we're -- the case is  
23 not about Google interfering with people's data plans in  
24 terms of what they paid for initially. Somebody could have  
25 made a consumer decision, I'm willing to pay \$60 a month for

1 unlimited data under this T Mobile plan. I get Netflix for  
2 free, whatever it is.

3       What's -- what's being challenged in this case and,  
4 therefore, what we should be trying to put a value on is the  
5 incremental or marginal amount of cellular data caused by  
6 these network transfers. So, the -- the relevant question I  
7 think is what you posed, your Honor, which is for a consumer  
8 that's already made that decision, I'm -- I'm paying 60  
9 bucks a months for this plan, I now know that Google is  
10 using a small increment of that, what is the value of that  
11 increment for that consumer? And there's -- there's nothing  
12 in the expert reports from Doctor Etner, certainly not from  
13 Doctor Speck who disclaims any expert opinion at all,  
14 there's nothing in the expert reports to support the value  
15 of cellular data when it's conceived in that way, which is  
16 the correct way to think about it because it ties to what's  
17 alleged in the case.

18       THE COURT: So, does Google offer an affirmative  
19 opinion on what that number should be? Like, if you were to  
20 value the right thing, what should the number be?

21       MR. SOMVICHIAN: So, Doctor Gos in his expert  
22 report points out the flaws in the Plaintiffs' calculation  
23 and applies some adjustment to it.

24       THE COURT: Yeah.

25       MR. SOMVICHIAN: But we're not -- we're not

1 purporting to provide, you know, our version of an accurate  
2 pricing for that hypothetical market. We're saying that you  
3 can't do it because --

4 THE COURT: Right.

5 MR. SOMVICHIAN: -- of the individualized nature  
6 of it --

7 THE COURT: Okay.

8 MR. SOMVICHIAN: -- and because of the need to  
9 account for differences in plan terms and bundled services  
10 and -- and everything else.

11 THE COURT: And then you do -- your experts do  
12 advocate this alternative theory of what's the economic  
13 harm? I'm calling it alternative theory, but that's not  
14 really the correct way to -- to phrase it in the case law.  
15 It's really the second part of the first method in Section  
16 3336, right? So, an amount sufficient to indemnify the  
17 party injured for the loss, which is natural, reasonable,  
18 and a proximate result. So, that's where you get into the  
19 question of unlimited plans versus not throttling or not --  
20 that kind of thing?

21 MR. SOMVICHIAN: Correct.

22 THE COURT: Right. So, but that's -- that's a --  
23 is it fair to say -- sorry to short circuit this, but is it  
24 fair to say that the Defendant's view is you can't actually  
25 put a fair market value on this sort of incremental marginal



1 data? You just can't do it? It has no value really, and,  
2 so, what we have to do is look at this alternative way of  
3 calculating the value of the property, which is sort of an  
4 indemnification point of view, but what would be the fair  
5 compensation.

6 MR. SOMVICHIAN: I think -- yes, your Honor. I  
7 think -- I think the -- the fairest way to summarize Doctor  
8 Gos's opinions is that there -- there could be value to that  
9 incremental marginal use, but there's no way to calculate it  
10 on a class-wide basis --

11 THE COURT: Okay.

12 MR. SOMVICHIAN: -- from common proof and is  
13 certainly not measured by either the average price or  
14 certainly the Google Fi price. And in -- in many instances,  
15 that value could be zero, particularly for users on an  
16 unlimited plan, and they may have a throttling cap that is  
17 so high or it's not even mandatory in a way where the --  
18 that marginal usage may have very little value to them, and  
19 that -- those --

20 THE COURT: But not just to those humans but to  
21 the category of people who find themselves in that  
22 situation, because I -- I don't want us to be like mistaking  
23 that we're trying to value it for a particular consumer.  
24 We're trying to assess what the value of that data is. And,  
25 so, would -- would Google's position be that you have to

1 consider these sort of subsets of the class? One part of  
2 the class has an unlimited data plan. Some other part of  
3 the class may have more constrained or limited plans, and  
4 those people are differently situated. Is that what you're  
5 arguing or are you arguing that it really does have to be an  
6 individualized calculation on a user-by-user basis and that  
7 can't be done in a class cert motion?

8 MR. SOMVICHIAN: So, your Honor, I -- I don't  
9 think we're advocating for a -- a standard that's  
10 impossible, you know, to -- to meet in any case, meaning I  
11 don't think we need to try to read people's minds about what  
12 -- what value they would put on something, but the -- the  
13 individual circumstances do matter in terms of the plan type  
14 because that -- that necessarily affects any effort to put a  
15 value on some increment of the data plan. These things are  
16 all created by contract, and the valuation of it has to  
17 analyze the -- the terms that are -- that are at issue. And  
18 it's not as simple -- it's not quite as simple as putting  
19 them into -- into a couple of buckets, you know, limited  
20 versus unlimited. They span an immense spectrum in terms of  
21 the particular types of plans. Just as a -- in terms of  
22 throttling, for example, some may be mandatory. Others may  
23 just depend on network congestion. Some may -- may -- and  
24 for some plans there is no throttling.

25 So, I think that our point is all that matters for

1 trying to put a value on the incremental value of data under  
2 any particular type of plan. But it's not -- I don't think  
3 it's -- I don't think it's subjective in -- in the sense of  
4 needing --

5 THE COURT: Right.

6 MR. SOMVICHIAN: -- to put somebody on the stand  
7 and ask them, Well, how much did you think this was worth.

8 THE COURT: Okay. Got it. Thank you.

9 (Pause.)

10 MS. GIULIANELLI: And, your Honor, when --  
11 whenever --

12 THE COURT: I know you want to have the --

13 MS. GIULIANELLI: -- Mr. Somvichian -- if we could  
14 just have a few minutes to respond to some of the things.  
15 Thank you.

16 THE COURT: That's fine. And I have a couple of  
17 follow-up things I wanted to ask.

18 MR. SOMVICHIAN: Yeah, so the -- just I think the  
19 last point on the average price, your Honor, I -- I think  
20 the -- the key takeaways for the average price, number one,  
21 as a -- as a legal matter, it -- it goes back to that  
22 Walmart, Jimenez, Tyson line of cases.

23 THE COURT: Okay.

24 MR. SOMVICHIAN: I mentioned those in the context  
25 of -- of problems of applying an average amount of data, but

1 those cases also preclude using some average amount as -- as  
2 the value.

3 THE COURT: Okay.

4 MR. SOMVICHIAN: So, again, if we -- if we use  
5 Tyson as the -- as the framework here, thinking about the --  
6 the issue, the question is were -- if -- if somebody has an  
7 unlimited plan, if -- if this case were just about an  
8 individual plan or if someone had an unlimited plan, very  
9 high throttling cap or maybe no throttling cap at all, and  
10 they effectively pay less than two dollars or under one  
11 dollar per gigabyte, there are many examples of this in the  
12 Gos exhibits. Under Tyson, why would that plaintiff be  
13 allowed to present an average price? I want to -- I want to  
14 recover two, three times more. Why? Because there's some  
15 industry metric for consumer surplus that generates a number  
16 that's higher. That would never be appropriate, your Honor,  
17 in the context of an individual case.

18 So, I think that case law precludes this average  
19 approach both with respect to the amount of cellular data  
20 and also the pricing of the cellular data.

21 THE COURT: Okay. I -- I understand that  
22 argument. The average amount of data and also the pricing.  
23 Got it.

24 Okay. Anything else that you'd like to highlight in  
25 opposition?

1 MR. SOMVICHIAN: I'm going to -- I'm going to  
2 scour my notes, and I'm --

3 THE COURT: Okay.

4 MR. SOMVICHIAN: -- sure there's something else,  
5 your Honor, but I'm -- I'm happy to pass the mic.

6 THE COURT: Okay. All right. I'll give the  
7 Plaintiff a brief opportunity to respond, and then I do want  
8 to address sort of these outstanding issues about how and to  
9 what extent I need to resolve the Daubert questions and also  
10 the stuff from the Chupo case that people keep wanting to  
11 share with me. Yes?

12 MR. SUMMERS: Your Honor, very briefly, on the  
13 question of the damages model --

14 THE COURT: Okay.

15 MR. SUMMERS: -- to be clear, we have a model to  
16 determine class-wide damages.

17 THE COURT: Um-hmm.

18 MR. SUMMERS: We take the quantity, the specific  
19 quantity of data that Google has consumed by virtue of the  
20 challenged transfers, which we calculate to the -- the byte,  
21 precisely based on tags, and we multiply it by the fair  
22 market value of the data. That is the model. There's no  
23 question that we have a model for determining aggregate  
24 class-wide damages. The question that's really posed here  
25 is what is the appropriate price and how should the -- the

1 jury determine the appropriate price for that model. No  
2 question that there is a damages model that is seaworthy  
3 here that warrants class certification.

4 Now, turning to that question, the Daubert motions  
5 really relate to expert testimony evidence relevant to the  
6 jury's determination of the fair market value of the bytes  
7 of cellular data that are taken. And I would respectfully  
8 submit that the analysis -- what we need to look at here is  
9 is the analysis provided by Doctor Etner reliable, and it  
10 is, because what he is doing is he is presenting to the jury  
11 specific data, data points about actual transactions in the  
12 real world during the class period involving actual class  
13 members, whether it's average, Google Fi, which is a couple  
14 of million consumers -- and even the overage charges. These  
15 are all data points that are relevant to the jury's  
16 determination of the fair market value of the cellular data.

17 Now, the Court may -- if the Court doesn't believe, for  
18 example, that the Google Fi price is necessarily the right  
19 price, that does not mean that this evidence is not  
20 relevant. It does not mean that the evidence is not  
21 reliable. It does not mean that the evidence is not helpful  
22 to a jury. And I would respectfully submit we have an  
23 appropriate model for determination of class-wide damages.  
24 No question about it, there is a factual issue to be -- to  
25 be determined by the jury, and the damages evidence that

1 we've submitted through Doctor Etner is reliable, relevant,  
2 probative helpful to the jury and meets all the requirements  
3 for expert testimony. So, I think the Daubert motions  
4 should be denied. Class certification should be granted.

5 I would posit that this issue of whether we need to  
6 look at a hypothetical transaction involving Google and  
7 consumer, rather than carriers and consumers, that that's  
8 something that's a bit new because Google did not make that  
9 precise argument the way the Court is articulating it.

10 Previously, Doctor Gos -- and we did not submit this  
11 because the issue wasn't really presented in this case, but  
12 Doctor Gos, previously their expert, their economist, said  
13 that you can look at the primary market and you could view  
14 this as a -- an issue -- this isn't an issue that we fully  
15 briefed, and I would respectfully -- and didn't really  
16 address in Doctor Etner's supplement because of it.

17 Respectfully, I would suggest that if there is a -- a  
18 bit of -- if the Court believes there's a bit of a -- a gap  
19 in the nexus, that we be afforded an opportunity to  
20 supplement Doctor Enter and/or such reports to address -- to  
21 tie the evidence he has provided to the secondary market and  
22 the hypothetical transaction between Google and consumers.  
23 That's something that Doctors Speck and Etner can do which  
24 would not involve new data or new -- it would be very  
25 discrete and it would be done very easily without disrupting

1 the schedule. And I think the circumstances here warrant  
2 it.

3 Just a couple other things. I know the Court doesn't  
4 want to hear about the Chupo case, but --

5 THE COURT: Well --

6 MR. SOMVICHIAN: -- the very same arguments  
7 presented here were teed up for the Chupo court twice, in  
8 2023 and just recently we provided the most recent decision,  
9 but --

10 THE COURT: Okay. Let me just pause you there  
11 because -- let me just sort of say a thing about Chupo,  
12 which, okay, if somebody gave evidence in Chupo, you know,  
13 so it's like prior testimony, fair game, right. Fair game  
14 in our case, in our trial, whatever. The fact that there  
15 was a decision on some objection, motion, whatever, in  
16 Chupo, unless it's binding on me, you know, maybe it has  
17 some persuasive value, but I'm not inclined to allow a bunch  
18 of supplemental briefing on that. So, I really -- no. That  
19 just -- no. We already have piles of material.

20 So, I just wanted to share with you guys that's my  
21 reaction is obviously if somebody made an admission in the  
22 trial, totally fair game here. But unless and until you  
23 tell me that some judge in the State Court system has made a  
24 binding decision, and I would be delighted to hear that --  
25 then I just -- don't expend your time on it.



1 MR. SUMMERS: On the -- that issue, two things,  
2 your Honor. I'm -- and I'm not arguing for the supplemental  
3 briefs right now. I was just --

4 THE COURT: Okay.

5 MR. SUMMERS: -- pointing out that we did submit  
6 the Chupo Court's initial decision denying -- basically  
7 carbon copies of the Daubert motions here was submitted as  
8 Exhibit 6 to their declaration, and we just submitted  
9 overnight the more recent decision that you then rejected  
10 their -- I mean, that's -- I mean carbon copy, verbatim the  
11 same motion.

12 THE COURT: I -- I know, but I'm not going to turn  
13 this into a sort of parallel proceeding on your post-trial  
14 motions in Chupo. I'm just not going to do that. So, I  
15 just --

16 MR. SUMMERS: Understood. One other thing, your  
17 Honor. Just to advise the Court, I do think that we will be  
18 making a motion for collateral estoppel, and but we will do  
19 so on or before the schedule for summary judgment. This  
20 case is all fours with Chupo. The case was tried. There  
21 was a special verdict form. All the issues were decided  
22 from whether this was property to the -- to the way to  
23 calculate damages. And the jury adopted Doctor Etner's  
24 average price methodology awarding damages, you know, that  
25 -- that reflected an adoption or finding of conversion as to

1 all four of the categories that we're going to be presenting  
2 in this case, the exact quantity of data that we provided to  
3 them, and his average industry price.

4 So, we do anticipate doing that. The -- the response  
5 we anticipate is that collateral estoppel will not be fully  
6 applicable until there's an appeal.

7 THE COURT: Well, don't you just need a judgment?  
8 Has judgment been entered?

9 MR. SUMMERS: A judgment has been entered.

10 THE COURT: Okay.

11 MR. SUMMERS: As of July 11th, and it reflects the  
12 jury's verdict. Post-trial briefing will be concluded and  
13 decided by November. But -- but --

14 THE COURT: Okay.

15 MR. SUMMERS: -- we will be making a motion for  
16 collateral estoppel, which might necessitate a stay for the  
17 appeal because under California law, the decision is not  
18 fully binding for collateral estoppel purposes at least  
19 until the appeal through the California Court of Appeal has  
20 been decided.

21 THE COURT: Okay. Well, that -- that's helpful to  
22 know that that request may be coming. I mean, from my very  
23 very selfish point of view, I'd rather not do a lot of work  
24 on something that is not going to matter because there are  
25 other events that will have or have already overtaken what

1 I'm doing here. It's just an efficiency point of view, but  
2 there may not be agreement on this point, and it may be that  
3 Google very much would like me to just kind of proceed, and  
4 I'll have to just take up whatever motion gets filed, if  
5 it's contested, whenever it is presented. If you agree on  
6 something -- and you have been agreeing on things from time  
7 to time, continuation of deadlines, et cetera, et cetera, by  
8 all means, let me know sooner rather than later if you agree  
9 on something so I can evaluate it then.

10 But -- but let me, if I may, pose the question to you  
11 all about what I'm to do with the Daubert motions, because,  
12 although you say let's focus on class cert, it necessarily  
13 requires me to evaluate what the experts have done, and  
14 there's a approach to evaluating expert evidence at the  
15 class cert stage that, for lack of a better word, I'm going  
16 to call Daubert lite, which is, you know, sometimes the  
17 methodology isn't even executed yet, right. It's like  
18 here's the methodology I proposed. It's class wide. It's  
19 based on class-wide evidence. It will work, and that is  
20 enough.

21 But here your experts have done the things. It's  
22 already done. There's no more expert evidence to -- to  
23 develop apart from this additional request here.

24

25 So, you know, to -- to what extent can I or should I

1 reserve some of these things for summary judgment versus I  
2 need to decide everything now, at least to the extent I'm  
3 going to rely on some expert's opinion for class  
4 certification? I just would like to understand what you all  
5 think about that question, and if you need time to ponder,  
6 that's fine.

7 MR. SOMVICHIAN: Yeah, I -- I think I can address  
8 that, your Honor.

9 THE COURT: Okay.

10 MR. SOMVICHIAN: So, with respect to Google's  
11 Daubert motions, if they're granted, that means class  
12 certification has to be denied because that means that there  
13 is no class-wide model for -- for damages, either with  
14 respect to the calculation of the amount of cellular data --  
15 that's our Daubert motion on technical issues, or on  
16 valuation.

17 So, the Daubert motions go directly to that. And if  
18 they're granted, that's another -- that's a -- that -- the  
19 result of that would have to be a denial of class  
20 certification separate and apart from what else you --  
21 whatever else you might find on consent or other issues,  
22 because I think we all recognize that under Comcast, there  
23 has to be a workable model of -- of proof for class-wide  
24 damages, and if the Daubert motions are granted, that goes  
25 by the wayside.

1 MS. GIULIANELLI: Your Honor, we would disagree  
2 with that obviously. With respect to the technical expert  
3 Daubert, Mr. Thompson, none of the things that Google -- the  
4 adjustments that Mr. Thompson makes that Google challenges  
5 eliminate the -- the methodology of counting the bytes.  
6 There are adjustment that Mr. Thompson makes and none of  
7 that is necessary for class certification because even if  
8 your Honor were to -- to grant the Daubert on all of those,  
9 which we don't think your Honor should, and we can get into  
10 that later, there is still a model. It's just uber uber  
11 conservative for counting the bytes. So, none of that is  
12 necessary for class certification or for Doctor Steck as  
13 well. We believe that that is unnecessary for class  
14 certification.

15 Google does one thing. They -- they challenge the  
16 sample. It is an absolutely random representative sample.  
17 We've already discussed that. And then there's the Doctor  
18 Etner that Mr. Summers has been talking about. So, we do  
19 not think that we -- there is a model, and that model is --  
20 is there, and the Daubert motions that Google brings have to  
21 do with the inputs and various -- various disputes about the  
22 inputs and how adjustments are made to that model.

23 THE COURT: Yeah. I guess what I'm really asking  
24 is not sort of the -- I know you disagree on the merits of  
25 the respective motions, but is there a way where I -- my

1 evaluation can only go so far and reserve on the remainder  
2 for some later time? Because, you know, I'm not -- I'm not  
3 necessarily deciding questions of admissibility at the class  
4 certification stage. It's something a little bit different.  
5 I hear Google saying that it -- there has to be a reliable  
6 methodology. Our Daubert motion says there isn't for  
7 calculating damages. Therefore, there isn't a basis for  
8 class certification. So, you should just -- you should  
9 decide the motion fully as it's briefed now, at least on the  
10 -- the damages experts.

11 And what I'm not entirely sure from the Plaintiffs'  
12 point of view is whether you think -- your -- your damages  
13 experts have already executed methodology. So, we're not at  
14 the stage where I'm merely being asked to evaluate have they  
15 proposed a methodology which, you know, could address this  
16 issue on a class-wide basis. You've done whatever the it is  
17 that you're going to do. So, I -- I feel like maybe the  
18 answer is I just need to decide these motions at least to  
19 the extent I'm going to rely on expert testimony for class  
20 certification. If there are some things that I'm not  
21 relying on for class certification, maybe I can not worry  
22 about those until our summary judgment stage or our pretrial  
23 stage if we get that far.

24 Does that make sense to the Plaintiffs, like that  
25 characterization of what's -- what the situation is?

1 MR. SUMMERS: I think that's exactly right, your  
2 Honor.

3 THE COURT: Okay. I have to -- I have to --

4 MR. SOMVICHIAN: I think --

5 THE COURT: -- decide it.

6 MR. SOMVICHIAN: I think you should address them  
7 to the extent necessary to rule on class certification.

8 THE COURT: Okay.

9 MR. SOMVICHIAN: Otherwise, the Court would be  
10 within its discretion.

11 THE COURT: Okay. Just kind of hang -- hang onto  
12 it. Okay. I know some of my colleagues have been in  
13 situations where they just have the methodology and then  
14 after class certification it gets executed, and then we have  
15 additional fights about it, and that's just not where we are  
16 as it happens in this case.

17 MR. SOMVICHIAN: That's exactly what we had, and I  
18 know you don't want to hear about Chupo --

19 THE COURT: Yeah.

20 MR. SOMVICHIAN: -- but we had a preliminary and  
21 then a more definitive post to the trial, and the evidence  
22 is more --

23 THE COURT: You just kind of skipped that step.

24 MR. SOMVICHIAN: -- developed of course.  
25 Understanding it's more developed, yeah.

1 THE COURT: Okay. Okay. Very good. Well, those  
2 were the last issues I wanted to raise with you. Thank you  
3 for a very very long argument this morning. I appreciate  
4 everyone's attention and all the briefing. I will do my  
5 best to get you an order as soon as I can, but you have  
6 briefed a ton of stuff, and it's going to take me a while.  
7 I'm a little bit concerned about being able to address this  
8 is a -- in the time that would be appropriate for you to  
9 then proceed with the next stage of what you have in the  
10 case, which I think is motions for summary judgment on  
11 October 3rd, so, having the benefit of my decision, you  
12 know, in that amount of time.

13 Have I got the date wrong? I see Plaintiffs are  
14 wondering about that.

15 MR. SUMMERS: I think we're amenable to pushing  
16 back the schedule to the extent necessary, your Honor.

17 MR. SOMVICHIAN: We'll confirm with the  
18 Plaintiffs, your Honor.

19 THE COURT: You can talk about it. Okay.

20 MR. SOMVICHIAN: I mean, there are no motions that  
21 they mentioned for the first time today. So --

22 THE COURT: Okay. It's all right. And, you know,  
23 I just -- I'm just flagging for you that you've presented a  
24 lot of material and -- and things for me to decide. So, I'm  
25 just -- this hearing has been very helpful, but I can't



1 really make any promises about how quickly I'm going to get  
2 this order.

3 UNIDENTIFIED SPEAKER: By the way, your Honor, we  
4 are very impressed with the amount of information the Court  
5 is able to digest. It's -- it's impressive. There's a lot  
6 of motions and a lot of detail to this case, and your  
7 familiarity with the facts and the law is very impressive.  
8 So, thank you.

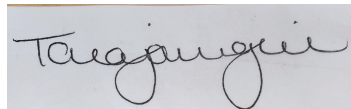
9 THE COURT: All right. All right. Very good.  
10 Well, thank you all very much, and this matter is concluded.  
11 The hearing is concluded. Thank you.

12 UNIDENTIFIED SPEAKER: Thank you, your Honor.  
13 (Proceedings adjourned at 12:54 p.m.)  
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A rectangular box containing a handwritten signature in cursive script, which appears to read "Teagunee".

Echo Reporting, Inc., Transcriber

Saturday, August 23, 2025